United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 74-1436

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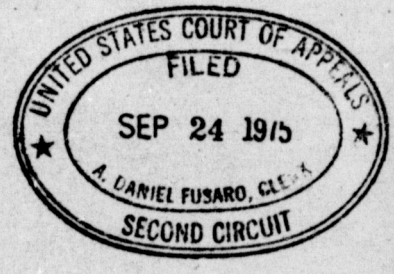
United States Court of Appeals

For the Second Circuit.



SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

-against-

SAMUEL H. SLOAN & Co.,
SAMUEL H. SLOAN,

Defendants-Appellants.

On Appeal From The United States District Court
For The Southern District Of New York

Appellant's Brief

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-against- 74-1436

SAMUEL H. SLOAN & CO.,
SAMUEL H. SLOAN,

Defendants-Appellants.

x

BRIEF OF THE APPELLANTS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the judgment of permanent injunction appealed from comply with the requirements of Rule 65 F.R. Civ. P.?

2. Did the Court below, McLean, J., abuse its discretion in granting the request of the S.E.C. for a temporary restraining order?

3. Did the Court below, McLean, J., abuse its discretion in ordering the entry of a preliminary injunction by consent?

4. Did the Court below, Ward, J., err in denying the motion by counsel for the defendants-appellants for discovery of the administrative proceeding transcript?

5. Did the Court below, Ward, J., err in denying the motion by defendant to dismiss the complaint for failure to state a claim, for failure to prosecute, and because the S.E.C. had elected to proceed via the administrative forum?

6. Did the Court below, Ward, J., abuse its discretion in denying the motion by defendant to vacate the preliminary injunction?

7. Did the Court below, Ward, J., err in denying Sloan's pro se motion for discovery of various specific documents as well as the entire investigatory file of the S.E.C.?

8. Did the Court below, Ward, J., err in making 31 findings of fact, most of which are either unsupported by the record or directly contrary to evidence contained in the record?

9. Did the Court below, Ward, J., err in ordering that defendants Sloan and Sloan & Co. be permanently enjoined?

10. Did the Court below, Ward, J., abuse its discretion in denying Sloan's pre-trial motion to enjoin the administrative proceeding?

11. Did the Court below, Ward, J., err in denying Sloan's post trial motion for declaratory relief declaring that he need not disclose the existence of the permanent injunction on any application for employment by a New York Stock Exchange Member firm?

12. Did the Court below, Ward, J., err in denying Sloan's post-trial motions for a hearing and for relief from judgment based upon newly discovered evidence and upon fraud, misconduct and other misrepresentation of an adverse party?

13. Are the Securities Exchange Act of 1934 (15 U.S.C. 78 a et. seq.), Sections 15(c), 17(a) and 27 of that Act and Rules 15c3-1, 17a-3 and 17a-4 unconstitutional and is the existance of the Securities Exchange Commission,an independent regulatory body which is not part of any of the three branches of Government,repugnant to the Constitution?

STATEMENT OF THE CASE[1]

This is an appeal from a Judgment of Permanent Injunction of the Hon. Robert J. Ward, United States District Judge, and from the denial of various post-trial motions. This appeal brings up for review the order of the Hon. Edward C. McLean temporarily restraining the defendants from engaging in unspecified violations of the Securities Exchange Act of 1934 ("Exchange Act"), the order of the Hon. Edward C. McLean preliminarily enjoining the defendants from engaging in unspecified violations of the Exchange Act, the decision of the Hon. Robert J. Ward, reported at 369 F. Supp. 994 (1973) in which the motion by defendants for discovery of an administrative proceeding transcript was denied, the unreported decision of the Hon. Robert J. Ward denying the motion by defendants to dismiss, to enjoin a related administrative proceeding, to vacate the preliminary injunction and to compel discovery, the findings of fact and conclusions of law of the Hon. Robert J. Ward reported at 369 F. Supp. 996 (1974), and post-trial motions by defendants for declaratory relief, for reargument, and for orders vacating the judgment on the grounds of newly discovered evidence, fraud, misconduct and other misrepresentation of an adverse party.

This action was commenced on June 17, 1971 when the plaintiff, Securities & Exchange Commission ("S.E.C."), filed a complaint in the United States District Court for the Southern District of New York. The defendants were Samuel H. Sloan & Co. ("Sloan & Co.") and Samuel H. Sloan ("Sloan"). The complaint alleged violations on the part of the

1. This statement of the case is based upon documents contained in the record on appeal and principally upon the transcript of the trial which took place from December 11, 1973 to December 21, 1973, with the exception of references to a conference in Judge McLean's chambers on June 21, 1971, of which no stenographic record was kept. For purposes of this brief, all references to the page and line numbers of the transcript of the trial are preceded by the letter "T" and all references to the transcript of an Administrative proceeding held from October 30, 1972 until November 1, 1972 are preceded by the letter "R."

defendants of Sections 15(b)(1), 15(c)(3) and 17(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78(b) (1), 78o(c) 3 and 78q(a) and Rules 17 C.F.R. 240.15b 1-2, 15c 3-1, 17a-3 and 17a-4 promulgated thereunder.

Simultaneous with the filing of the complaint, the S.E.C. filed an affidavit of Sheldon G. Kanoff ("Kanoff") and a memorandum of law in support of a motion by the S.E.C. for a Temporary Restraining Order, the Appointment of a Receiver, and a Preliminary Injunction against the named defendants. The affidavit of Kanoff purported to be based on:

> "information and belief upon my personal inspection of certain books and other documents of defendant Samuel H. Sloan & Co., and upon statements made to me or in my presence by defendant Samuel Sloan and other persons and information contained in the official files of the Commission."

The affidavit of Kanoff consisted of 26 numbered paragraphs and contained numerous charges of fraud, misrepresentation, and misappropriation of assets. The accompaning memorandum of law contained further charges of wrongdoing on the part of the defendants. However, neither the affidavit nor the accompanying memorandum of law were served upon Sloan or Sloan & Co.

On Friday, June 18, 1971, the summons and complaint were served on defendant Sloan. No answer or responsive pleading was ever filed in this case. However, on Monday, June 21, 1971, a conference was held in the chambers of the Hon. Edward C. McLean, to consider the application by the S.E.C. for a temporary restraining order against the defendants. Present before Judge McLean were S.E.C. staff attorneys William Nortman ("Nortman") and George W. Brandt, Jr. ("Brandt") as well as defendant Sloan and his then counsel Roy L. Weiss ("Weiss"). At this conference, Brandt urged that the court sign the temporary restraining order because Sloan had failed to provide the S.E.C. with an April 30, 1971 or a May 31, 1971

trial balance and because the state of Sloan's records was such that the S.E.C. could not ascertain his true net capital position. Brandt also asserted that the S.E.C. had traced a mysterious $25,000 entry through the books of Sloan and that the S.E.C. believed that this represented funds belonging to a non-disclosed public customer and that unless the temporary restraining order was signed the public was in grave danger of being harmed.[2]

In response, Sloan and his counsel asserted that Sloan's records were available and in compliance with S.E.C. rules and that Sloan had gone to considerable lengths to comply with the requests of the S.E.C. and had cooperated fully by producing his books and records at the office of the S.E.C. on two occasions and by making them available to members of the S.E.C. staff when ever they visited his office. As to the trial balances for the end of April, 1971 and May, 1971, Sloan stated that a copy of the April 30, 1971 trial balance had been provided to the S.E.C. as requested and that the S.E.C. had never requested a May, 1971 trial balance. As to the mysterious $25,000 entry, Sloan stated that he had no such entry on his books and he had no idea what Mr. Brandt was talking about and that neither Mr. Brandt nor anyone else employed by the S.E.C. had previously questioned him with regard to this matter.

At that point, Judge McLean asked Mr. Weiss how his client would be harmed if he signed the temporary restraining order and set the matter down for a hearing in two days. Sloan himself stated that he would not strenously object so long as the temporary restraining order only prohibited him from actually buying and selling securities during the two

2. Although no stenographic record of this conference was kept, the charges made by Brandt and Nortman in Judge McLean's chambers were substantially the same as those made in a"memorandum of law" filed by the S.E.C. on June 17, 1971. (Document #3 of the record). This "memorandum of law", while not technically evidence, is part of the record on appeal.

day period so that he would be permitted to receive and deliver securities, to pay checks and to consummate existing contractual commitments during this two day period. Sloan stated that if he were not permitted to accept delivery of securities, even for a short two day period, his reputation as a securities dealer would be irreparably ruined because this fact would immediately become know to brokers all over Wall Street.

When the proposal that Sloan be permitted to receive and deliver securities, while at the same time restrained from effecting actual purchases and sales, did not meet with any apparent objection by the S.E.C., Judge McLean signed the temporary restraining order after writing by hand on the proposed order the words "except completing transactions heretofore committed" (T-656, line 6 to 657, line 7).

Shortly after the temporary restraining order was signed a copy of this order was served on the Chemical Bank by the S.E.C. Thereafter William Nortman called Jim Wolf of the Chemical Bank and told him not to honor any checks drawn against Sloan's account at Chemical Bank except checks written prior to the signing of Judge McLean's order. As a result, the Chemical Bank treated Sloan's account as an attached account and refused to make payment on any checks presented even though Sloan then had $37,999.03 in his account. (T-673). However, it was later demonstrated at the trial that the Chemical Bank actually stopped honoring checks on June 18, 1971, the day on which the summons and complaint were served (T-668, line 21 to T-669, line 9) and did not reopen the account until June 28, 1971. Presumably, this occurred as the result of a prior communication by the S.E.C. to the Chemical Bank, although at trial Nortman denied having made any such communication. (T-697, lines 2-5).

On June 23, 1971, the parties appeared in Judge McLean's court for a hearing on the motion by the S.E.C. for a preliminary injunction and for the appointment of a temporary receiver. Although Sloan offered to

close his business voluntarily, (Transcript dated June 23, 1971, p. 4, line 1) he refused to consent to an injunction of any kind (p. 3, line 8). Nevertheless, his attorney, Roy L. Weiss, continued to probe the possibilities of some kind of consent decree or settlement. (p. 6, line 13). The S.E.C. stated that its position was that Sloan could immediately go back into business with the restraint against his bank account lifted and the request for a receiver held in abeyance provided that he would consent to an injunction. (p. 10, line 15). After a long colloquy regarding this matter, Sloan ultimately agreed to a preliminary injunction by consent. (p. 17, line 18).

No answer was filed and there were no further proceedings in this matter until July, 1973 when the defendant made a discovery motion. However, in the meantime, in April, 1972, the S.E.C. commenced an administrative proceeding against Sloan and Sloan & Co. entitled In the Matter of Samuel H. Sloan, et ano. (Adm. Pro. File No. 3-3680). In that proceeding, the S.E.C. staff alleged that the respondents had violated S.E.C. Rules 15c3-1, 17a-3, 17a-4, 17a-5, 17a-10 and 17a-11 and that the respondents had consented to a preliminary injunction on June 24, 1971 and that, as a result, the broker dealer registration of Sloan & Co. should be revoked and Sloan should be permanently barred from association with a securities dealer. From October 30, 1972 to November 1, 1972 a hearing was held in this matter before Administrative Law Judge Ralph Hunter Tracy. On April 24, 1973, the Administrative Law Judge rendered an initial decision ordering that the registration as a broker dealer of Sloan & Co. be revoked and that Sloan be barred from association with a broker dealer unless a petition for review was timely filed with the S.E.C. as to a party, in which case the initial decision would not become final with respect to that party. A petition for review was filed on behalf of Sloan and Sloan & Co. and final briefs were filed in July, 1973.[3]

3. The outcome of this proceeding is now before this court in Sloan v S.E.C. et al 75-4087.

In July, 1973, the defendant, represented by his new counsel, Robert W. Taylor, moved for discovery of the administrative proceeding transcript. The basis for this motion was that the S.E.C. had stated an intention to use this transcript as evidence and that the discovery of the transcript was necessary to the defense. The S.E.C. opposed the motion on the grounds that the S.E.C. had contracted with the C.S.A. Reporting Service and, under the terms of the contract, the C.S.A. Reporting Service retained the exclusive right to provide stenographic services in all investigatory and administrative proceedings conducted by the S.E.C. and to sell these transcripts to the S.E.C. and to the public. Included as Exhibit 4 in the S.E.C.'s opposing papers was a copy of the contract. The motion was denied by Judge Ward in a decision reported in 369 F. Supp. 994 (1073).

On August 16, 1973, which was coincidentally, the date of Judge Ward's decision, Sloan discontinued actively engaging in a securities business and subsequently took up the reins of his own defense. On November 7, 1973, appearing in person for the first time, Sloan moved for several forms of relief. First, Sloan moved to dismiss, or, in the alternative,to vacate the preliminary injunction on the grounds that (1) the complaint failed to state a claim upon which relief can be granted (2) the plaintiff had failed to prosecute (3) the terms of the injunction had been fulfilled, certain allegations in the complaint had proved untrue and the capital deficiencies, if any, had been cured (4) the plaintiff had failed to join a necessary party (5) this Court lacked subject matter jurisdiction (6) the existence of the injunction placed an unreasonable burden upon the defendant (7) the action was barred by res judicata and estoppal (8) the plaintiff had withheld documentary evidence in its possession which disproved certain allegations of plaintiff (9) it was in the public interest for this action to be dismissed (10) the plaintiff had sought to deprive the defendant of his constitutional rights and (11)

the Exchange Act and the S.E.C. rules 15c3-1, 17a-3, and 17a-4 were unconstitutional. Sloan also moved for discovery and other relief. Judge Ward denied the motion on November 20, 1973.

Sloan then moved for costs and for the appointment of counsel. Judge Ward decided this motion on December 7, 1973 by stating:

> "Motion denied except the defendant Samuel H. Sloan may represent himself pro se assisted by either his present attorney or by a substituted attorney. So ordered."

On December 5, 1973, the S.E.C. submitted proposed findings of fact and conclusions of law. Slaon submitted his own proposed finds of fact and conclusions of law on December 10, 1973. The trial of this action commenced on December 11, 1973. The plaintiff rested its case on December 13, 1973 and the court then adjourned the continuation of the trial until December 20, 1973. The defendant in person presented his case on December 20, 1973 and December 21, 1973 and the court then closed his case. On January 18, 1974 Judge Ward signed a Judgment of Permanent Injunction which was entered in this action.

On March 13, 1974, the defendant filed a Notice of Appeal from this judgment of permanent injunction. Subsequently, the defendant made a number of post-trial motions. First, the defendant moved pursuant to rule 8(a) F.R. App. P. to suspend the injunction pending appeal and, in the alternative, for declatory relief declaring that he need not disclose the existence of the injunction on an application which Sloan intended to cause to be filed with the New York Stock Exchange on the grounds that he was seeking to become a registered representative with a member firm of the New York Stock Exchange and the injunction was causing him irreparable harm in that it was effectively preventing him from obtaining gainful employment. This motion was opposed by the S.E.C. and was denied without opinion by Judge Ward. Subsequently, the defendant moved for a new trial pursuant to Rule 60(b)(2) on the grounds of newly discovered evidence, for leave to proceed in forma pauperis on the grounds that the

defendant was without sufficient funds to prosecute this appeal, for re-argument on the grounds that the district court never permitted argument on the merits in the first instance either before, during, or after the trial and on the ground that the court was in error on each and every one of its 31 findings of fact and for relief from final judgment pursuant to Rule 60(b)(3) F.R. Civ. P. on the grounds of fraud, misrepresentation and other misconduct of an adverse party. Sloan also moved to convent a three judge court pursuant to 28 U.S.C. 2282 and 28 U.S.C. 2284. All of these motions were opposed by the S.E.C. and all were denied without a hearing and without opinion by Judge Ward except for the motion to convene a three judge court which was denied by Judge Ward who stated he had no jurisdiction to consider the motion since a Notice of Appeal had already been filed. A second notice of appeal was filed with respect to that portion of those motions which were appealable and, as a result, these post trial motions became the subject of this appeal.[4]

SUMMARY OF ARGUMENT

The complaint contains nothing more than conclusatory allegations of violations of various S.E.C. rules and fails to allege sufficient facts or specific injury. As a consequence the complaint fails to state a claim upon which relief can be granted. The district court lacked subject matter jurisdiction because Sections 21(e) and 27 of the Exchange Act, upon which the S.E.C. relied to confer jurisdiction upon the district court,,are unconstitutional. Similarly, the district court lacked jurisdiction because of its failure to convene a three judge court to consider the constitutional questions before it. The complaint should have been dismissed for failure to join a necessary party, i.e.,

4. It appears from the docket sheet in this court that both notices of appeal were filed under U.S.C.A. docket number 74-1436. On this basis, this brief will treat the two notices of appeal as having been consolidated.

Sloan's original partner Harry G. Theodos. The complaint should also have been dismissed for failure to prosecute. Under Rule 23 of the Federal local Rules for the Southern District of New York civil cases which have been pending for more than one year and are not on the trial calendar shall be subject to an order dismissing the cause for want of prosecution. The district court erred in denying discovery under the discovery rules of F.R.Civ. P. and, in denying discovery, allowed the S.E.C., to in effect, sustain a claim of sovereign immunity. The district court, Ward, J., displayed prejudice before, during and after the trial. It appears from reading the decision denying the motion to dismiss that the district court did not even read the moving papers of the defendant but instead copied the S.E.C.'s brief almost word for word. At trial, the district court permitted the S.E.C. to offer evidence concerning a variety of matters which had taken place since the filing of the complaint. Prior to the time at trial that the court agreed to hear evidence regarding these matters the defendant had no way of knowing what would be the subject of the trial and, as a consequence, had no time to prepare his cross examination. At the same time, the district court denied defendants request for a continuation of the trial to call Robert W. Taylor as a witness. The district court displayed prosecutional zeal in helping the presentation of the hapless S.E.C. attorney in charge of the case and, at the same time, failed to provide similar assistance to the pro se defendant. The district court refused to permit the defendant to call certain witnesses and denied the efforts of the defendant to elicit testimony that S.E.C. staff attorneys had lied to the court and had committed numerous acts of fraud and professional misconduct. Finally, the district court made 31 enumerated findings of fact which were almost totally unsupported by evidence and which were, in several cases, demonstrably untrue. The district court did not even ask for briefs from the litigants after the trial and refused to accept argument. As a result, the S.E.C. was never put to the task of showing by citing to the record where it had pre-

sented evidence at trial to prove its case. The S.E.C. based its entire case on testimony by three S.E.C. staff investigators and the testimony of Sloan and upon exhibits primarily consisting of involved "net capital computations" prepared by these investigators. These "net capital computations" were inadmissible as evidence against the defendants. No claim was made by the S.E.C. that Sloan had caused injury or had attempted to cause injury to the public and the S.E.C. conceeded that Sloan, in general, did no business with the public. By admitting these net capital computations into evidence and by permitting the S.E.C. to give testimony into collateral areas, the court caused the burden of proof to be shifted from the plaintiff to the defendant. The net capital computations reflected numerous conclusions of law and other conclusions which were wrong and which, in many cases, were based on the rankest kind of hearsay. For example, S.E.C. investigator Bruder testified that he deducted $10,000.00 from Sloan's net capital based upon a telephone call to Sloan's mother and upon the fact that Sloan's mother failed to respond to a letter written to her by the S.E.C. staff. Bruder testified that he deducted $10,000.00 from his computation of Sloan's net capital as an amount due and owing to Sloan's mother. Bruder also testified that Sloan's mother had told him on the telephone that her son did not owe her any money. Similarly, S.E.C. investigator Kanoff testified that he deducted $58,175.00 from Sloan's February, 1971 trial balance as a loan payable to Joseph Iny whereas Kanoff had no basis for making such a net capital deduction and Kanoff in fact knew that Sloan at no time had owed such a sum of money to Iny. Without these net capital deductions and without numerous other net capital deductions erroneously taken by members of the S.E.C. staff, Sloan would be shown to have been in net capital compliance on most of the dates in question, the remaining dates being dates when Sloan was not doing business.

In fact, the prosecution of this action from the beginning has been characterized by professional misconduct and dishonesty on the part of members of the S.E.C. staff. At trial, Sloan established that the S.E.C. staff attorneys had willfully concealed the existence of the April 30, 1971 trial balance from the court and that the initial brief submitted by the S.E.C. in June, 1971 contained numerous false statements of fact which the attorneys in question then well knew to be untrue. The district court nevertheless failed and refused to listen to this argument or to hear evidence regarding this matter. The district court refused to permit Sloan to examine S.E.C. attorneys Selvers and Rashes and permitted Sloan to ask only one question of S.E.C. attorney Nortman although the answer given by Mr. Nortman to that single question appeared to be untrue. In deciding the case, the district court copied the S.E.C.'s proposed findings of fact, submitted prior to the trial, thereby incorporating into the decision of the court numerous false statements of fact. In addition, the district court failed to include the one finding of fact favorable to the defendants which the S.E.C. submitted in its proposed finding of fact. The "judgment of injunction" signed by the district court failed to comply with rule 65(d) F.R. Civ. P. in that it failed to describe in reasonable detail the acts sought to be restrained. That judgment contains nothing more than a blanket prohibition from violating S.E.C. Rules 15c3-1 and 17a-3 and 4. The injunction itself is unnecessary because there is no need to enjoin the defendants or any other persons from violating the law. Furthermore, the prosecution of injunctive actions of this nature causes a tremendous waste of judicial time and should not be allowed or, in any event, should be discouraged by the courts.

After, the trial, Sloan made a number of post trial motions. The S.E.C. responded to each of these motions by submitting a "memorandum

of law" asserting facts not in the record. At no time did the S.E.C. submit an affidavit executed by an S.E.C. staff member in opposition to these motions. Furthermore, these memorandums of law consisted primarily of attacks upon the personality and character of the defendant and generally failed to argue the facts and the law of the case. For example, on page 8 of its "memorandum" in opposition to the motion pursuant to Rule 60(b)(3) the S.E.C. stated:

> "The question of Sloan's credibility is certainly a serious matter. However, the Commission has amply demonstrated to the trier of the facts that Sloan is neither honest nor truthful in his business dealings and prior testimony. Clearly Sloan's previous conduct, indicates that he is not to be believed."

Regardless of the merits of this claim, Sloan's credibility was not at issue in this motion. Following this, the S.E.C.'s memorandum continued for another seven pages of personal attacks upon the defendant without citing a single authority and without making a single reference to the record. From this and other "memorandums of law" filed by the S.E.C. it appears that the S.E.C. is pursuing something akin to a personal vendetta against the defendant and is belaboring the character of the defendant since it has no answer to the legal and factual arguments which the defendant has raised. Since memorandums do not constitute evidence in a court of law, and the affidavits submitted by Sloan themselves presented facts sufficient to warrant the granting of the motions, the post-trial motions of the defendant should have been granted.

ARGUMENT

POINT I

THE PROSECUTION OF THIS ACTION CONSTITUTES AN ABUSE OF THE JUDICIAL PROCESS.

The courts are available to injured parties who wish to litigate. In the case at the bar, however, the S.E.C. when it commenced this action had no desire to litigate its claim. Rather, from the outset, the S.E.C. displayed a desire to obtain a quickie

settlement and nothing else. When it became apparent that such a settlement was not forthcomming the S.E.C. applied increasingly high pressure and extortionistic tactics in order to force a settlement while at the same time delaying and postponing the day when it would be compelled to prove its case in court. When it finally was forced to try its case, most of the evidence offered by the S.E.C. had nothing to do with its original claims.

The record of this appeal consists of an 853 page trial transcript and about 100 exhibits including a 443 page administrative proceeding transcript, several hundred pages of investigative proceeding transcripts, several hundred pages of "trial balances" and "capital analysis" prepared by the S.E.C. staff, numerous ledgers, balance sheets, books of account and other documents pertaining to the business of the defendants, various broker-dealer files and other files maintained by the S.E.C. and several hundred pages of affidavits, exhibits and other motion papers submitted in connection with pre-trial motions and post-trial motions. The entire record consists of well over two thousand pages of miscellaneous material. The state of the record imposes a burdensome appeal upon the defendants and, no doubt, upon the court.

Out of necessity, the bulk of this brief must deal with the 31 findings of fact made by the district judge who tried this case. In view of the rules of this Court which limit the size of briefs it will not be possible to give more than passing attention to numerous questions of fact and law involved in this appeal.[5]

5. Defendants-appellants have already attempted to file a 236 page brief and this brief was rejected by the court.

However, one point which should not be permitted to escape the attention of this court is that this lawsuit became vastly complicated because of the manner in which the S.E.C. abused the judicial process.

The complaint was filed on June 17, 1971. The ad damnum of the complaint demanded not only an injunction but the appointment of a receiver. Based upon the complaint, the affidavit of Kanoff, and the accompanying memorandum of law, the Hon. Edward C. McLean granted a temporary restraining order. Based upon the authority of this temporary restraining order, the S.E.C. immediately attached all of the available funds in Sloan's bank account at Chemical Bank. The funds in question amounted to $37,999.03 (T-559). In two days the Chemical Bank bounced twenty-eight checks drawn by Sloan totalling more than $24,000 and transferred all of Sloan's funds to an "attached account." (Special Supplemental Affidavit ¶44 and exhibit C attached thereto). When Sloan complained to the S.E.C., the S.E.C. offered to drop its request for a receiver and to return to Sloan his $37,999.03 provided that Sloan would consent to an injunction. After a long colloquy before Judge McLean on June 23, 1971 Sloan agreed to consent to a preliminary injunction although he steadfastly refused to consent to a permanent injunction.

The seizure of Sloan's bank account was the first of many illegal acts which characterized the conduct of the S.E.C. attorneys throughout this lengthy proceeding. When Judge McLean signed the temporary restraining order on June 21, 1971,

he stated to all persons present including William Nortman, the S.E.C. attorney in charge of this case, that the order only restrained Sloan from making new transactions and that Sloan would be permitted to complete existing contractual commitments. This language was embodied in Judge McLean's order with the handwritten words "except completing transactions heretofore committed."

Nevertheless, a few hours after leaving Judge McLean's chambers, Nortman called Sloan's account officer at Chemical Bank and directed him to refuse to honor all checks written by Sloan after the signing of the temporary restraining order.

At trial, Nortman testified as follows (T-696):

"DIRECT EXAMINATION BY MR. SLOAN:

Q Did there come a time when you spoke to a Mr. Jim Wolf of the Chemical Bank ?
A There may have been. What point in time ?
Mr. Sloan, I have many telephone conversations with many people. If you are asking me if I spoke to Mr. Wolf prior to Judge McLean's order, I have no recollection of ever speaking to him."

However, the transcript of the hearing on June 23, 1971 directly contradicts Nortman's testimony. On that occasion Nortman said (p. 11):

".....As a result I have been on the phone innumerable times either with Mr. Sloan or Mr. Weiss finding out what checks were written prior to your Honor's signing the temporary restraining order. Then I had to communicate with the bank and tell them, in effect, these checks are kosher to clear prior to the time because they were written before your Honor signed the temporary restraining order."

Thus Nortman lied when, in response to a perfectly proper legal question, he testified: "There may have been." The correct answer to that question was a simple "Yes." Had Nortman answered the question truthfully, the opposing sides could have argued the significance of that answer at the appropriate time. Unfortunately, the Court would not permit the defendant to continue this line of questioning.

Only a few minutes before he testified, Mr. Nortman suggested to the Court that it was the bank that was at fault. Nortman stated (T-692, line 11):

> "I think if you read that you will see that it is quite clear that Mr. Weiss himself says if there is a foul up it is because the banks did not have an opportunity to check with Mr. Nortman to get a clarification as to what the status and what the meaning of that temporary restraining order was."

Again Nortman made a false representation to the Court (this time not under oath). Regardless of what Weiss said, and Weiss clearly did not participate in any telephone conversations between Mr. Nortman and the bank , Nortman knew that the bank had been in constant touch with him. However, Nortman twice suggested in Court that it was the bank that was fouled up (T-691, line 25 and T-692, line 13). Then he stated (T-693, line 7):

> "How Mr. Sloan can now have the temerity to say that it was I who told the bank to commit an unlawful act...."

It is easy for Mr. Sloan to have the temerity when the evidence is overwhelming that that actually occurred.

Specifically, the bank bounced all checks presented from June 18, 1971 to June 28, 1971 regardless of the dates on which they were written. One of the exhibits introduced by the bank officer who testified at the trial, Defendant's Exhibit CC, contained the following interesting memorandum dated June 21, 1971:

> "Samuel H. Sloan & Co.
>
> Inasmuch as we have received a restraining notice on the subject account please return all checks until further notice, with the exception of checks numbered 261 through 305 inclusive. We have authorized to pay these items by Mr. William Nortman of the S.E.C. who may be reached on 264-1690."

It must not be forgotten that the actual temporary restraining order read as follows:

> " AND IT IS FURTHER ORDERED, that pending determination of plaintiff's motion for the appointment of a temporary receiver, the defendants Samuel H. Sloan & Co. and Samuel H. Sloan, their officers, agents, servants, employees, depositories, banks and those persons in active concert or participation with them be, and hereby are, restrained from directly or indirectly transferring, liquidating, pledging, or otherwise disposing of any of the assets of the defendant Samuel H. Sloan & Co. except completing transactions heretofore committed until such time as the aforesaid defendant is in compliance with Sections 15(b)(1), 15(c)(3), and 17(a) of the Securities Exchange Act of 1934 as amended. . . ." (emphasis added.)

Thus, the question of when the checks were written was of no significance. The only thing that mattered was whether the checks were written in settlement of transactions "heretofore committed." In the securities industry all trades are settled five business days after the trade date. Thus, even if Sloan

had violated the temporary restraining order by buying or selling securities after 10:40 A.M. on June 21, 1971, he would not have been writing a check in settlement of such transactions until June 28, 1971, five business days later. As a result, all checks should have been paid by the bank. The record establishes that Sloan had $37,999.03 in his account at the Chemical Bank on June 21, 1971. Thus, by telling the bank to bounce checks, Nortman was telling the bank to commit an unlawful act.

Clearly, the S.E.C. used unlawful means to coerce and terrorize Sloan into "consenting" to a preliminary injunction. However, the abuse of the judicial process did not stop there. Part of the terms of the "consent" injunction was that Sloan would hire an accountant, Robert W. Taylor, ("Taylor"), who was a personal friend of Joseph C. Barton ("Barton") the then S.E.C. chief of broker dealer inspection. Barton arranged the introduction of Sloan to Taylor from his office at the S.E.C. a few hours after the temporary restraining order was signed on June 21, 1971. One of the terms of the proposed "consent" injunction was that Sloan file a certified balance sheet with the S.E.C. Taylor offered to prepare such a balance sheet in return for payment of $1200. Sloan immediately agreed. Thus, when Nortman agreed to the preliminary injunction on June 23, 1971 it was on the express representation by Sloan's counsel, Weiss, that Sloan would hire Taylor as his accountant. (Transcript of colloquy of June 23, 1971, p. 18 lines 11-20).

On July 28, 1971 a meeting was held at the offices of the

S.E.C. Present were Sloan, Weiss, Taylor, Kanoff and Nortman. Taylor advised the S.E.C. that the results of his audit were that Sloan had a net worth of $48,770 and no public customers. The next day Taylor filed his report with the S.E.C. However, the S.E.C. refused to accept this report as an X-17A-5 filing.[6]

Since the S.E.C. had commenced this lawsuit with the allegation that Sloan was in the process of misappropriating the assets of public customers and that Sloan had "lied" by claiming that he had no public customers, and since Taylor, the S.E.C.'s hand picked accountant, reported that Sloan indeed had no public customers, it would appear that the S.E.C. should have been willing to admit its mistake and to agree to a discontinuance by stipulation. Instead, the S.E.C. adopted a strategy which was calculated to force Sloan to consent to a permanent injunction or, if Sloan did not consent, to enable the S.E.C. to win its case in court without ever being required to offer evidence at a trial or a hearing on the merits.

First, the S.E.C., over a period of several months, made telephone calls to Sloan, Taylor, and Weiss threatening to

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6. At the administrative proceeding Kanoff testified that the S.E.C. had not treated this as an X-17A-5 filing because it had been filed pursuant to a court order. (R-105) The significance of this was that the administrative proceeding was based, in part, on Sloan's alleged failure to file an X-17A-5 report.

commence an administrative proceeding against Sloan if Sloan would not agree to a permanent injunction by "consent." When this tactic failed to produce results, the S.E.C., on April 24, 1972, commenced an administrative proceeding against Sloan. The S.E.C. then offered to "settle" this administative proceeding with a 60-day suspension. After Sloan had expressed a willingness to agree to this settlement it became apparent that the S.E.C. expected Sloan to consent to the permanent injunction as part of the deal. However, Sloan reiterated his refusal to "consent" to the permanent injunction and the administrative proceeding went forward.

An administrative hearing was held from October 30, 1972, to November 1,1972. On April 25, 1973, an "administrative law judge," Ralph Hunter Tracy, rendered an "Initial Decision." Sloan thereafter filed a petition for review with the S.E.C. On May 4, 1973 a pre-trial conference was scheduled before Judge Ward. There, counsel for the S.E.C. suggested that the Court accept the transcripts of testimony of the administrative proceeding in lieu of the Courts holding full evidentiary hearing. (Affidavit of Rashes, ¶ 2). After the S.E.C. had made this suggestion, Taylor, who by this time had been hired as Sloan's counsel, asked that the S.E.C. make available a copy of this transcript "for inspection and copying." The S.E.C. refused this request stating that Taylor must purchase the 443 page transcript from the CSA Reporting Service at the rate of $1.35 per page unless Taylor would waive a full evidentiary hearing in which case the S.E.C. would give Taylor a free copy of the transcript. Taylor refused and thereafter made a

discovery motion. This motion was denied in a decision reported at 369 F. Supp. 994 (1973).

A trial was held from December 11, 1973 until December 21, 1973. In the section of this brief dealing with the findings of fact it will be shown that much of the "evidence" upon which the S.E.C. based its case was fictious or fraudulently conceived. The S.E.C. failed to prove any of the statements made by Kanoff in his original affidavit in support of a motion for a temporary restraining order.

After judgment was entered by the district court, Sloan filed a notice of appeal. On March 9, 1975, before this appeal had been perfected, Sloan was struck by an automobile with the result that both of his legs were broken. While Sloan was in the hospital recovering from his injuries, the appeal was dismissed "for failure to prosecute." Shortly thereafter, on April 28, 1975, the S.E.C. made its final decision of the administrative proceeding which had been pending ever since the "Initial Decision" of April 25, 1973. However, the final decision was not based on the facts found by the administrative law judge in his Initial Decision nor was it based on arguments presented in the briefs' filed by the S.E.C.'s staff. Instead, it was based on the S.E.C.'s "independant review of the record" which turned out to include matters not in the record at all but rather matters involving findings of fact made by Judge Ward concerning events which occurred in 1973 and orders of injunction which were entered by Judge Ward in 1974

and 1975. The final decision in the administrative proceeding made it clear that the S.E.C. was waiting for the appeal to be decided prior to deciding the administrative proceeding.

It is submitted that these circumstances set forth numerous abuses of the judicial process. Undoubtedly, if the S.E.C. had had a sound case, it would have pressed for a permanent injunction on June 23, 1971 as it could have done under Rule 65(a)(2) F.R. Civ. P. Had it done so, the record would have been relatively simple. Instead, it delayed the resolution of the injunctive proceeding and commenced an administrative proceeding based upon the injunctive proceeding. This put the defendant in the position of having to defend on two fronts in two proceedings which were based on precisely the same "facts."

The basis of injunctive relief in the federal courts is irreparable harm and inadequacy of legal remedies. Sampson v Murray 415 U.S. 61, 88 (1974); Beacon Theatres v Westover 359 U.S. 500, 506-7 (1959). An essential prerequisite for injunctive relief in any case is irreparable injury. Bob Jones University v Simon 415 U.S. 725, 737 (1974); Alexander v "Americans United",Inc. 416 U.S. 752, 762 (1974). In the case at the bar, the S.E.C. had available two legal remedies which are not available to private parties. First, it could have applied to the U.S. Attorney to bring a criminal prosecution against Sloan under §21(e) of the Exchange Act (15 U.S.C. 78u(e)). In view of its claim that Sloan had misappropriated the assets of public customers, such an application would not have been

inappropriate.[7] Second, it could have instituted an administrative proceeding against Sloan, a route which it ultimately took.

Under Far East Conference v United States 342 U.S. 570 (1952) there can be little doubt that the complaint of the S.E.C. should have been dismissed as soon as the S.E.C. instituted its own administrative proceeding. Accordingly, this court should vacate the judgment of the district court and remand with instructions to dismiss the complaint. However, the fact that this disposition of this lawsuit would do little to alleviate the incredible harm which the defendant has suffered by the malicious maintainance of this lawsuit serves to illustrate the point that the S.E.C., by the prosecution of this action, has abused the judicial process. It is evident that one of the goals of the S.E.C. whenever it brings a lawsuit of this nature is to embarrass the defendants and to punish them by the publication of the charges against them. The S.E.C. accomplishes this purpose by the publication of the "S.E.C. News Digest" which is essentially a scandal sheet which reports "news" such as the filing of complaints by the S.E.C. as well as actions taken by the U.S. Attorney to publish violations of federal securities law.

It is obvious that most defendants "consent" to the entry of a permanent injunction in order to avoid the airing of the charges brought by the S.E.C. These defendants accomplish this by waiving Rule 52(a) F.R. Civ. P. which requires that

7. It will be seen, however, that this claim was entirely ficticious and fraudulent and based upon an affidavit tainted with perjury.

the court make findings of fact. In the case at the bar the defendant refused to "consent" to a permanent injunction and the S.E.C. punished him by inducing, by means of fraud and deceit, the district judge to make 31 findings of fact including 13 sub-paragraphs, few if any of which were supported by competent evidence. The very publication of these findings of fact in the Federal Supplement has caused and will continue to cause injury to the appellant. Thus, in order to remedy the harm occasioned by these findings of fact this court must cull the record and determine that these findings are un-supported.

If this lawsuit had been commenced to accomplish a legitimate remedial purpose, there would probably be little merit to the argument that the publication of the decision in this case resulted in injury to the appellant. However, in the case at the bar the publication of the findings of fact and the resulting embarrassment to the appellant was the ultimate goal of this lawsuit rather than an intermediate step towards a legitimate end. The injunction entered in this case merely enjoined the defendant from violating the law, something he was enjoined from doing in any case. Marbury v Madison 5 U.S. (1 Cranch) 137, 172 (1803). Therefore, it would seem that the injunction is a "mild prophylactic" of the mildest form; so mild as to be almost non-existant. However, the injunction, while virtually a nullity on its face, has the effect of being used as a stepping stone by the S.E.C. to butress its own administrative proceeding. Under §15(b)5(C) of the Exchange Act an injunction provides the

basis for the S.E.C. to bar a person from being associated with a broker or dealer. Thus the true purpose for which the S.E.C. pursued this lawsuit for three years was not to get an injunction but rather to embarrass the defendant and to establish a statutory basis to revoke Sloan's broker dealer registration and to bar him from being associated with any broker or dealer. This fact is demonstrated by the S.E.C.'s final decision of the administrative proceeding.

Clearly, this is an abuse of the judicial process. When a complaint is filed in a district court, the ad damnum should state the nature of the relief sought. Rule 7(a) F.R. Civ. P. If it turns out that the plaintiff was actually seeking something else and that the complaint was filed in bad faith, the complaint should be dismissed. An action should not be permitted to proceed in the courts where its purpose is to butress a proceeding being prosecuted simultaneously in the administative forum. Therefore, the decision of the Court below should be reversed. In addition, the prosecution of an injunctive action of this sort will have the effect of depriving the defendant of his constitutional rights if the S.E.C. ever makes a motion for contempt. S.E.C. v Coffey 493, F. 2d 1304 (6th Cir. 1974) cert. denied _____ U.S. ___, 42 L. Ed. 2d. 837 (1975).

POINT II

THE JUDGMENT OF INJUNCTION FAILS TO COMPLY WITH RULE 65(d) F. R. CIV. P.

This point is rather obvious. The judgment of injunction makes no attempt to comply with the Rule 65(d) F. R. Civ. P. The rule in question is discussed in Schmidt v Lessard 414 U.S. 473, 476 (1974). See also Sampson v Murray, supra 415 U.S. at 99 (Marshall, J., dissenting); Mayo v Lakeland Highlands Canning Co. 309 U.S. 310, 316 (1940). It is not necessary to embark upon an extended discussion of the many ways in which the injunction fails to comply with Rule 65(d). However, it should be observed that the injunction "incorporates by reference" S.E.C. Rules 15c3-1, 17a-3, and 17a-4. These rules are constantly being amended and revised by the S.E.C. Therefore, the injunction is contrary to the purpose of Rule 65(d) which is that the party be able to determine by reading one document what he is prohibited from doing. Seagram-Distillers Corp. v New Cut Rate Liquiors, Inc. 221 F. 2d 815 (7th Cir. 1955) cert. denied 350 U.S. 828.

Whether a court could draft an injunction in this case which complies with Rules 52(a) and 65(d) F. R. Civ. P. is another question. In view of the fact that S.E.C. rules 15c3-1, 17a-3 and 17a-4 are unconstitutionally arbitrary as well as unconstitutionally vague and uncertain, it is doubtful whether a court could do so. However, if the court below had at least made an effort to comply with Rule 65(d) this court on appeal could more easily decide the constitutional issues involved in this case.

POINT III

THIS ACTION SHOULD HAVE BEEN DISMISSED FOR FAILURE TO PROSECUTE.

After filing the complaint, the S.E.C. did nothing to bring this case to trial except when prodded by the court. This explains the fact that the case did not come to trial until two and a half years after the complaint was filed even though there were no discovery proceedings. Under these circumstances the complaint could and should have been dismissed under Rule 23 of the General Rules for the Southern District of New York and Rule 41(b) F.R. Civ. P. Under the circumstances of this case the district court abused its descretion in failing to dismiss the complaint. S.E.C. v Power Resources Corp. 495 F. 2d 297 (10th Cir. 1974). The defendants suffered prejudice by virtue of delay since, when the case came to trial, the S.E.C. focused its attention primarily on events which occured after the complaint had been filed. Furthermore, the delay did not benefit the defendants since the defendants were not informed of what they were accused of doing until the S.E.C. filed its proposed findings of fact on December 5, 1973 or six days before the trial commenced.

POINT IV

THE COMPLAINT FAILED TO STATE ANY CLAIM ON WHICH RELIEF MAY BE GRANTED.

The complaint makes no attempt to meet the pleading requirements in this circuit. In actions alleging securities law violations, mere conclusatory allegations to the effect that defendants conduct was fraudulent or in violation of the rules and regulations provided for in the various securities acts are wholly insufficient. Shemtob v Shearson, Hammill & Co. 448 F. 2d 442

(2d Cir. 1971). There is no legal significance to allegations of violations of federal securities laws without any supporting facts. Without more, the complaint, failing to set forth facts and providing only conclusory charges devoid of factual content lacks legal significance and should be dismissed. Israel v City Rent and Rehabilitation Administration of the City of New York 285 F. Supp. 908 (S.D.N.Y. 1968). Since the allegations of the complaint are totally unsupported by any allegations of facts, the district court is not compelled to presume the correctness of those allegations absent the allegations of facts in support thereof. Ryan v Scoggin, 245 F. 2d 54 (10th Cir., 1957) Hess v Petrillo 259 F. 2d 735 (7th Cir. 1958), Sexton v Barry 233 F. 2d 220 (6th Cir., 1956). Factual insufficiency alone can warrant dismissal on the basis of Rule 12(b)(6) F.R. Civ. P. DeLoach v Crowley's Inc. 128 F. 2d 378 (5th Cir. 1942). Where there is clearly an absence of facts to make a good claim, dismissal is proper, and if it appears that the complaint cannot be amended to cure the defenct and to state a claim, dismissal with prejudice is within the district court's jurisdiction. Feinberg v Leech 243 F. 2d 64 (5th Cir. 1957); Cook v Hirschberg 258 F. 2d 56 (2d Civ. 1958); International Longshoremen's and Warehousemen's Union v Kuntz, 334 F. 2d 165 (9th Cir. 1964); Kaminsky v Abrams, et al. 281 F. Supp. 501 (S.D.N.Y. 1968).

Rule 9(b) F.R. Civ. P. provides:

> "(b) In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally."

Although the complaint in this action failed to allege fraud, mistake, malice, intent, knowledge or any other condition of the mind, it is submitted that the same rule of law applies. In Segal v Gordon, et al. 467 F. 2d 602 (2d. Cir., 1972), the Court of Appeals summarized the rule of law which is controlling in this circuit.

> "It is a serious matter to charge a person with fraud and hence no one is permitted to do so unless he is willing to put himself on the record as to what the alleged fraud consists of specifically." 467 F. 2d. at 607.

An application by the S.E.C. for an injunction must meet the traditional equity requirements for an injunction in general. S.E.C. v Frank 388 F. 2d 483 (2d Cir. 1968).

Furthermore, the complaint presents a non-justiciable controversy. Baker v Carr 369 U.S. 186, 217 (1962). Claims of violations of the S.E.C.'s bookkeeping and net capital rules involves issues of fact not within the conventional experience of judges. Under the doctrine of primary administrative jurisdiction, whenever the enforcement of a claim requires the resolution of issues which, under a regulatory scheme, have been placed withing the special competence of an administrative body, those issues must be referred to that administrative body for its views. United States v Western P. R. Co. 352 U.S. 59 (1956); Hewitt-Robins, Inc. v Eastern Freight Ways, Inc. 371 U.S. 84 (1972); Amalgamated Meat Cutters & Butcher Workmen v Jewel Tea Co. 381 U.S. 676 (1965); International Brotherhood of Boilermakers, etc. v Hardeman 401 U.S. 233 (1971) rehearing denied 402 U.S. 967. The fact that the suit is brought by the government and not by a private plaintiff does not affect the

application of this doctrine and in such cases the complaint should be dismissed. Far East Conference v United States, supra. See also United States v Parrott 249 F. Supp. 196 (1965). The government may apply to the courts for injunctive relief only in cases involving unsettled questions of law. Mitchell v Lublin, McGaugh & Associates 358 U.S. 207 (1959). Since the S.E.C. is neither an injured party nor part of a constitutionally authorized branch of the government it does not posess the requisite standing to sue. Flast v Cohen 302 U.S., 633 (1973). Neither the first, second, nor third causes of action allege that irreparable injury will result unless the defendants are enjoined and therefore the extraordinary remedy of injunctive relief is unavailable. Bob Jones University v Simon, supra. Although the S.E.C. contends that an injunction is necessary in the "public interest," the "public interest" standard is non-justisciable and may not be applied by the courts since policy determinations are within the exclusive province of Congress. Baker v Carr, supra. Section 21(e) of the Exchange Act fails to carve out any justiciable standard for the granting of injunctive relief.

POINT V

THE DISTRICT COURT ERRED IN DENYING THE MOTIONS AND REQUESTS FOR DISCOVERY AND THE PRODUCTION OF DOCUMENTS.

The S.E.C. is subject to the same rules of discovery as any other litigant. Fay v United States 22 F. R. D. 28 (S.D.N.Y. 1958); Warren v United States 17 F.R.D. 389 (S.D.N.Y. 1955); Bowles v Ackerman 4 F.R.D. 260 (1945); Continental Distilling Corp. v Humphrey 17 F.R.D. 237 (1955); S.E.C. v First American Bank

& Trust Co. CCH Fed. Sec. Law Rep. ¶94,222 (1973 transfer binder) (D.C. N. Dak.).

The S.E.C. contended that all material sought by discovery was non-discoverable under a theory of "work product privilege" with the exception of the 443 page administrative proceeding transcript which could be purchased from the CSA Reporting Service at $1.35 per page. The district court agreed and denied all requests for discovery except at trial it ordered the S.E.C. to produce an April 30, 1971 trial balance which the S.E.C. claimed not to have, (T-285, line 20); a stock record listing (T-285, line 24); letters written by Sloan to the S.E.C. (T-286, line 17) and a deposition of Joseph F. Iny which had been taken in Judge McLean's court (T-288, line 11). The court denied a request by Sloan for a deposition of Iny taken by the S.E.C. in its own investigative proceeding even though Sloan intended to call Iny as a witness. (T-289, line 3). This was error since the Jencks Act, 18 U.S.C. 3500, required the production of this deposition.

It was also error to deny the request for the administrative proceeding transcript. See 369 F. Supp. 994. Sloan should have been permitted to make a copy of the administrative proceeding transcript in the S.E.C. public reference room at the cost of $0.10 per page rather than be required to pay the CSA Reporting Service $1.35 per page. Sloan did not buy the administrative proceeding transcript and was at a tremendous disadvantage throughout the trial as a result, particularly since the administrative proceeding transcript was admitted into evidence.

The S.E.C. was not entitled to prevail on a claim of "work product" privilege since the documents which it claimed were covered by this privilege were never submitted for an "in camera" inspection by the court. In S.E.C. v Bausch & Lomb, Inc. CCH Fed. Sec. Law Rep. ¶94,825 (1974 transfer binder) Judge Ward made a similar error even though in that case the documents were submitted to an "in camera" inspection. If the documents in the possession of the S.E.C. were as innocuous as they were claimed to be, there was no compelling interest in a denial. In short, discovery should have been permitted. Burke v United States 32 F.R.D. 213 (1962).

Because of the refusal of the district court to permit discovery, none of the 45 exhibits offered into evidence by the S.E.C. had ever been seen by the defendant prior to the trial with the exception of those exhibits which had been involved in the administrative proceeding. Clearly, this circumstance demonstrates that substantial rights of the defendants were prejudiced by this judicial error. See Rule 61 F.R. Civ. P.

POINT VI

THE DISTRICT COURT FAILED TO GIVE THE DEFENDANT A FAIR AND IMPARTIAL TRIAL.

During the trial the district court judge abused his powers in just about every possible way. When Sloan was either testifying or cross examining witnesses / Judge Ward continuously paced the floor behind the bench with his hands clasped behind his back. He frequently shouted at the pro se defendant and sometimes came down from the bench and stomped around the courtroom while Sloan was testifying. He often bared his teeth and at one point broke

a pencil in his hands.

These facts, of course, are not disclosed by the record and this is one of the inherent inadequacies of appellate review. However, the record does establish many examples of judicial prejudice.

The court interfered with the orderly presentation of the defendant's case. When Sloan commenced his direct case, the court directed him to call Joseph Iny as his first witness (T-535, line 4), even though Sloan had scheduled several witnesses to testify before Iny. Sloan repeatedly asked permission to interrupt his examination of Iny so that his other witnesses could testify and also meet their committments (T-573, line 2), (T-573,line 20), (T-590, line 5). Finally, Sloan's witnesses who were not under subpoena started to revolt. One of them left the courtroom with a promise to return and his testimony was lost altogetner. When another witness, Leon, started to leave the courtroom the Court ordered him to stay (T-500, line 16). Another, Falk, protested but the Court would not permit him to leave either (T-629, line 24).

Relatively early in the trial the Court stated that it thought it knew what the issues were (T-386, line 19) and that the issues were primarily matters of law (T-442, line 25). The Court admonished the defendant not to create issues which don't exist (T-43, line 22) and said if he did so he would be sadly mistaken (T-151, line 23). It asked defendant to get on with his questioning (T-185, line 23) and, during the first day of trial, said it would not sit in the courtroom day after day (T-186, line 17) listening to his cross examination. The Court also did

not ask for recross of Kanoff (T-200, line 4). On one occasion involving a direct disagreement of fact involving Sloan and Beirne, the Court sided with Beirne (T-217, line 18). Even while the Commission was still presenting its direct case, the Court stated that the trial could not go beyond that day (T-365, line 6). Also when defendant claimed that the Commission had attempted to perpetrate a prior fraud upon the court (T-369, line 8) the Court ruled that that claim was irrelevant (T-370, line 12) because the burden of proof was on the government (T-370, line 19) and the prior fraud would not help the Commission in making its case (T-370, line 24). When defendant pointed out a mistake in Appoldt's trial balance, the Court told him to get on with it (T-459, line 20). When the Commission completed its case, the Court advised defendant that he would finish on the next day he set (T-519, line 6). When the trial resumed, the Court would not grant a continuation for the calling of Sloan's accountant, Robert W. Taylor (T-530, line 21). The Court directed defendant to call Iny as his first witness (T-535, line 6) and stated that it was the last day for trial (T-535, line 10). He stated that the testimony of Nortman would be irrelevant (T-687, line 7) and that the actions of the Commission were reflected solely in certain papers, books, records, and proceedings (T-688, line 19). Finally, the Court declared that the defendant had had more than his day in Court (T-708, line 14) and told him he would close his case (T-711, line 6). The Court would not grant a continuation to permit two witnesses who had left the courtroom that day to testify (T-712, line 4) and said that an intermission of a week should have been suf-

ficient (T-770, line 5) especially since defendant had two months notice of the trial date (T-788, line 24). The court stated that if it would give very little weight to the capital computations offered into evidence by Sloan. (T-751 line 22).

The Court gave aid and advice to the hapless S.E.C. attorney (T-219) while refusing to give Sloan similar aid (T-177, line 12). The Court displayed prosecutional zeal and frequently interrupted the examination of Sloan by the S.E.C. attorney to conduct his own lengthy examination (T-220 to T-222), (T-237, line 3 to T-239, line 14), (T-247 to T-250), (T-252 to T-255), (T-257 to T-259), (T-259 to T-298), (T-312 to T-314), (T-327 to T-331), (T-732 to T-739), (T-742 to T-746). Other displays of prejudice occurred on T-153, line 7; T-157, line 8, T-186, line 11; T-244, line 9. Furthermore, when Sloan attempted to call present or former S.E.C. attorneys Nortman, Selvers, Rashes and Duffy as witness, the Court argued with Sloan and when these arguments failed the court repeatedly made menacing remarks. (T-14, line 15); (T-15, lines 3 and 6); (T-682, line 5); (T-682 to T-695); (T-698 to T-710).

However, the greatest display of prejudice can be seen from the manner in which the district court "found" the facts of this case.

POINT VII

THE DISTRICT COURT ERRED BY FINDING FACTS UNSUPPORTED BY THE RECORD.

At the outset it should be noted that the district court refused to permit argument during the trial (T-147, line 25); (T-306, line 23); (T-318, line 23); (T-354, line 5) while at the same time indicating that there would be a time later to argue this case. However, the district court did not request the submission of post-trial briefs. Therefore, the instant brief provides the first authorized opportunity to argue the facts of this case.

The S.E.C. based its entire case on the testimony of Sloan and three S.E.C. employees. The "evidence" in this case consisted primarily of "trial balances" and"capital analysis" prepared by the S.E.C. staff. Sloan continuously objected to the admission of these documents into evidence. Clearly, these documents were inadmissible. Even the trial balance prepared by Sloan were inadmissible. Unsworn written statements cannot be considered as evidence in an injunction proceeding except by consent. Dainese v Board of Public Works 91 U.S. 580. Furthermore, where the documents are admitted by consent, the presentation of a mass of statistical information still cannot satisfy the burden of proof. United States v Borden Co. 370 U.S. 460, 471 (1962). In the case at the bar, all of the capital analysis prepared by the S.E.C. staff were strongly contested. By finding for the S.E.C. and against Sloan, the district court was merely expressing a preference of one piece of paper over the other.

In many instances the assertion by the S.E.C. that Sloan did not meet the net capital requirements was basedon a claim by the S.E.C. that the market value of the securities owned by Sloan was less than the market value which Sloan and/or his accountants had ascribed to these securities. However, there is no clear method by which one can determine what the market value of a security is. Rule 15c3-1 fails to address this problem. There was no way for Sloan to determine what market value the S.E.C. investigators would assign to his securities. Thus, there was no way for Sloan to have reasonably understood at what point his conduct was prohibited. The Exchange Act is a criminal statute. Consequently, Rule 15c3-1 is void for vagueness. United States v Harris 347 U.S. 612, 617 (1954); Connally v General Construction Co. 269 U.S. 385, 391; Lanzetta v New Jersey 306 U.S. 451, 453; Papacristou v City of Jacksonville 405 U.S. 156, 165-171 (1972); Grayned v City of Rockford 408 U.S. 104, 108-9 (1972); Smith v Goguen 415 U.S. 566, 575 (1964). See also Commissioner v National Alfalfa Dehydrating 417 U.S. 134 (1974) which illustrates some of the problems in the pricing of securities.

Furthermore, the S.E.C. based its case on the testimony of witnesses were not competent to testify. The testimony of an S.E.C. investigator who inspected the books of the defendant does not constitute a sufficient showing to justify either a temporary or a permanent injunction. S.E.C. v Reiter 146 F. Supp. 552 (S.D.N.Y. 1956). Kanoff, Bruder and Appoldt, all S.E.C. present or former employees, were not competent to testify on behalf of the S.E.C. A slave or a servant is not competent to testify on behalf of his master. Respublica v Bob 4 Dall 145; French v Hall 119 U.S. 152. The partiality of a witness is always relevant as discrediting the witness and affecting the weight of his testimony Davis v Alaska 415 U.S. 308, 116 (1974). Furthermore, the court was in error in receiving "expert" testimony from Kanoff, Bruder and Appoldt concerning their understanding and interpretation of the S.E.C.'s rules. MCI Communications Corp. v American Telephone & Telegraph Co. 369 F. Supp. 1004, 1027 (1974). Nevertheless, such testimony was received over repeated objections by Sloan. (T-34 line 15), (T-40 line 14), (T-464 line 14).

The court erred in refusing to permit Sloan to call Nortman, Rashes and Selvers as his witnesses because this refusal denied Sloan's Sixth Amendment right to confront his accusers. Greene v McElroy 369 U.S. 474, 497 (1959); Southern R. Co. v Virginia 290 U.S. 190 Ohio Bell Tel. Co. v Public Utilities Comm. 301 U.S. 292 Reilly v Pinkus 338 U.S. 269. Sloan should not have been required to testify as a witness for the S.E.C. because, if the allegations made by the S.E.C. were true, it was against his interest to do so. United States v Grundy 3 Cranch 337, 344 (1806); United States v Murphy 16 Pet 203; United States v Parrott, supra.

The testimony of Kanoff was perjured. Kanoff testified that Sloan had never given the S.E.C. a copy of this April 30, 1971 trial balance. (T-50 line 20), (T-170 line 23). Kanoff testified the same way

at the administrative hearing. However, after first being rebuffed (T-171 line 2), Sloan obtained an order requiring the S.E.C. attorneys to search their files for the trial balance. (T-285 line 20). The S.E.C. complied and was forced to withdraw two of its proposed findings of fact (T-353 line 12). The testimony of Kanoff was thereby impeached and should not have been given any weight by the court. The principle that the government may not knowingly use false testimony is implicit in any concept of ordered liberty. Napue v Illinois 360 U.S. 264, 268 (1959).

Turning to the specific facts of this case, it can be seen that even if all of the evidence was properly received in this case, the findings of fact by the district court will still not find support in the record. Further, even if all of the findings of fact were supportable, the S.E.C. would still not be entitled to an injunction. S.E.C. v Casper, Rogers & Co. 194 F. Supp. 589 (1961); S.E.C. v Phillip A. Michael Securities CCH Fed. Sec. Law Rep. ¶ 94, 611 (1973-74 transfer binder). United Transportation Union v State Bar of Michigan 401 U.S. 576, 583 (1971).

Finding #1. This is not a finding of fact but rather is a conclusion of law.

Finding #2. There is essentially no evidence in the record on this point. Exhibits 1 and 39, consisting of broker dealer files maintained by the S.E.C., show that Sloan & Co. is a partnership with the partners being Samuel H. Sloan and Harry G. Theodos.

Finding #4. This finding is contrary to the evidence. Kanoff actually testified that his visits to Sloan's offices after March 19. 1971 were for the purpose of picking up things rather than for the purpose of examining Sloan's records (T-180, lines 2-12). There Kanoff testified:

> Q. Between May 31st of '71 and August 16, 1973, you never went to the office of Sloan to examine his records. ?
> A. As I recall, my visits from this point only were to pick up material rather than examine the records.

Q. As a matter of fact, Mr. Kanoff, the only time that you examined the records of Sloan and Company was on March 19, 1971, is that correct ?
A. At your offices ?
Q. That's correct.
A. I don't really recall, but I would go along with that.

Finding #5. There is no evidence in the record that Appoldt visited Sloan's offices in June, 1973.

Finding #7. Although Bruder testified somewhat along these lines at trial, this was not what he actually said. Bruder's entire testimony on this point came in the form of one question (T-479, line 22).

It can be seen that the district court, in making its findings of fact, added to the limited statement of Bruder. The testimony of Bruder fails to show S.E.C. rules violations. For example, since there is no evidence that Sloan had customers on January 15, 1971, it was not necessary for Sloan to maintain a customer ledger on that date.

On cross, it was demonstrated that Bruder's complaint was not that Sloan did not have the required records but that Bruder did not like the form in which they were maintained. On T-497, line 17 Bruder testified:

Q. Were the books kept in compliance with the then rules of the Commission.
The Court. In your opinion .
A. No, sir, not in my opinion.
Q. And why not ?
A. They are not properly maintained. Half of the ledger -- half of the material is on the blotter and the other half is on the fail to receive ledger. You haven't a complete record of either one.
Q. But taken together they constitute a complete record ?
A. They would constitute a record.

This basically conforms to the testimony of Bruder at the administrative proceeding. At R-54-56 Bruder testified on cross that Sloan had all the required records.

Furthermore, at both the administrative proceeding and at the trial Bruder did not testify until after he had the opportunity to read from his notes. (R-21-2).

The complaint of Mr. Bruder was that Sloan had failed to maintain

"properly" and keep "current" certain books and records. No claim was made that Sloan did not have books and records. At trial Sloan presented his books for this period to Bruder and Bruder did not deny that it appeared that it was these books that he had examined in Sloan's office (T-491). These documents are marked as defendant's exhibits I & J. It can be seen from an examination of these books and records that Sloan did maintain records. Thus Bruder was contending solely that the records were maintained in improper form. However, there is no rule which prescribes the form in which records must be maintained.

Finding #8. The record fails to support the first sentence of this finding of fact. However, more importantly, this is an instance of a deliberate misrepresentation of facts by the S.E.C. On the date in question, Sloan appeared at the offices of the S.E.C. with not only a trial balance but with his entire books and records. The S.E.C. attorney present, Alan M. Rashes, examined the records and returned them to Sloan. The books and records examined by Rashes contained the "supporting schedules" which "were not furnished." There is no indication in the transcript of the deposition of January 18, 1971 (plaintiff's exhibit 30) or elsewhere that the S.E.C. was in any way dissatisfied with the presentation Sloan made on January 18, 1971. The first notice to Sloan that the S.E.C. was dissatisfied with the state of Sloan's records on that date came in the affidavit of Kanoff dated June 17, 1971. Thus, even if there is some merit to the claim by the S.E.C. on this point, it is barred by the doctrine of laches.

One final point should be made with respect to this finding which is that supporting schedules are unnecessary for the purpose of making a capital computation. The only purpose of the supporting schedules is to verify the information contained in the trial balance.

Finding #9. There was no testimony on this purported fact and, furthermore, the S.E.C. failed to ask Bruder even a single question concerning

a visit supposedly made on February 25, 1975.

Finding #10. Nowhere in Kanoff's direct testimony did he mention the name of Joseph Iny. Thus, this entire finding is not supported by the record. However, on redirect, Selvers rose to ask "just two or three very brief questions." (T-197, line 25). Selvers then asked Kanoff about Iny for the first time (T-199, line 8).

After this improper redirect examination, the court did not ask the pro se defendant if he wanted the opportunity for recross. (T-200, line 4). However, even the testimony elicited from this improper questioning fell far short of establishing sufficient evidence to support finding #10 in the district's court decision. In any event, anyone with a grasp of high school bookkeeping knows that assets = liabilities + net worth. Thus, whether an item was a liability or a capital asset would not change the basic equation.

Finding #11. Again, the district court has added much to what Kanoff actually said. The only testimony on this point came in T-50, lines 5-12.

Thus no testimony was given by Kanoff that a capital computation could not be prepared or that the books and records were not being maintained in accordance with Rule 17a-3. This testimony refers to nothing more than the fact that Sloan was maintaining his books and records on a computer bookkeeping system which produced standard computer runs rather than physical bound books. There is nothing in Rule 17a-3 which prohibits the use of computer bookkeeping systems and, in fact, these systems have become generally accepted in the industry.

Finding #12. This time there is some evidence in the record to support this finding. Here is what Kanoff said: (T-52 lines 15-21)

> Q. Were you able to verify the March trial balance, which was the purpose of your visit ?
> A. No, sir.
> Q. Why not ?
> A. Certain records were not forthcoming from Mr. Sloan that I needed to verify. Delivery bills. Basically delivery bills.

Relative to the June 9, 1971 visit, Kanoff testified (T-54, lines 6-24):

Q. Yes, what was the purpose of your visit Mr. Kanoff?
A. I wanted another trial balance but it was unavailable to me.
Q. An which trial balance were you seeking at this time?
A. I believe it was the May balance.
Q. And none was available, is that correct?
A. That's correct.

In spite of the fact that, according to the S.E.C.,the answers to these improper and leading questions demonstrate that Sloan is an incorrigible securities law violator, a little cross examination showed these claims to have little merit. To begin with, on direct examination with regard to the visits of May 6 and June 9, 1971, Kanoff was permitted to read from memorandums he had prepared relative to these visits (Plaintiff's exhibits 4 & 5) while testifying. Thus, this testimony should have been accorded little weight. In any event, on cross Kanoff testified that even with the aid of his memorandums he could not recall which delivery bills he was unable to find (T-167, line 20) (T-168, line 20).

Furthermore, Kanoff testified, relative to his requests for a trial balance (T-175, line 12):

Q. Now, on one of these occasions did Mr. Sloan come back to you and say that the trial balance would be ready in about 15 minutes?
A. I recall an occasion where you said it would be ready shortly, I wouldn't say I recall the 15 minute time.
Q. When I said it would be ready shortly, what did you then do?
A. I believe I left your office at that point.

Continuing (T-176, line 5) Kanoff testified:

Q. Mr. Kanoff, why didn't you wait for the trial balance?
A. As I recall we ... I, through the Commission, the Regional office, made numerous requests for it and it had been promised and promised, and I made that particular visit for the purpose, the sole purpose of picking it up. It wasn't ready, it was not available. On the basis of the prior form in producing a trial balance I had no reason to believe the"shortly it will be ready" would be shortly.

Actually, this paragraph, far from setting forth a legitimate grievance against Sloan, is demonstrative of the arrogant attitude of the S.E.C.

It must be remembered that Sloan was essentially a one man firm at this time, although he engaged two runners to deliver securities. Sloan was acting as a market maker in thirty securities while simultaneously acting in the function of trader, bookkeeper, cashier, receive and deliver clerk, and compliance officer. On the occasion of the visit in question, Kanoff walked into Sloan's office unexpectdly , as was his policy, and apparently expected Sloan to drop everything he was doing in order to give him a copy of the trial balance. Furthermore, the claim that the S.E.C. had been put to considerable trouble to obtain trial balances from Sloan is without basis according to Kanoff's testimony. With regard to the question as to why Kanoff only asked for the April trial balance once and was directed not to press Sloan further, Kanoff testified (T-178 line 8).

> The Witness: Your Honor, as best as I recall, no one specifically said 'don't press him for it' but several people in the office involved in this investigation, when made aware of the fact that I did not receive it after it was requested, didn't specifically go out and tell me 'Go get it' or make a second or third or fourth request. They just took that fact and let it lay. The matter of Mr. Sloan and Company was not the thing in my desk. I have other things to do.

In short, rather than wait fifteen minutes for Sloan to produce the trial balance, the S.E.C. decided to proceed expeditiously by coming into court and asking for injunctive relief.

Finding #13. Again the district court added to what Kanoff actually said. Kanoff's entire testimony on this point can be found at T-66. From this testimony, even liberally construed, it does not appear that Sloan was violating S.E.C. rules. Nothing in Rule 17a-3 requires that trades be posted by a certain date. Also, under the principles of logic, Sloan was not required to keep books unless he was doing business. In any event, this testimony is lacking in sufficient detail to show a violation of Rule 17a-3.

Finding #14. There is no evidence in the record which indicated that the firm's trading inventory submitted to the commission was inaccurate.

Finding #15. Again there is no evidence in the record which proves this point. Furthermore, this is a clear example of a fraudulent claim by the S.E.C. legal staff. Sloan's post trial Rule 60(b)3 motion delt with this finding in considerable detail and demonstrated that this finding involved a clear case of fraud and misconduct on the part of the S.E.C. staff.

Finding # 16. As the Court itself observed, there was no item on Sloan's books for consulting fees. (T-389 line 20.) There the court stated:

> "I don't see the item. That is why I am having difficulty here."

As to the next sentence, there was no testimony as to what attempts were made to verify these entries.

Finally, Hafdis Simonarson testified that she and Johanna Baldursdottir (not Baldursttir) worked for Sloan rather than for Sloan & Co. (T-677).

In any event, there is nothing in this paragraph which could possibly be construed as a violation of federal securities law.

Finding #17. Although Appoldt did testify that Sloan had computer runs up until July 30, 1973 on this date (T-395 lines 12-16) , this circumstance does not set forth a violation of S.E.C. bookkeeping rules. Again, there is no requirement as to the time by which computer runs must be posted.

Finding #18. This finding is untrue as can be seen from plaintiff's exhibit 37, which is the trial balance for August 2, 1973. The untruth of this finding can also be established by the testimony of Appoldt who stated (T-402 lines 8-11):

> Q. Mr. Appoldt, in making this determination, were any of the trades in Canadian Javelin included ?
> A. There are some trades in Canadian Javelin shown on these sheets, yes.

Furthermore, all of Appoldts testimony concerning Sloan's supposed failure to disclose trades was stricken by the Court. (T-400 line 6).

Finding #19. This finding is reasonably accurate. However, there was no testimony that Sloan was unable to produce the requested capital computations. When the S.E.C. tried to ask the question, the testimony went as follows (T-325 lines 7-10):

> Q. Were you able to produce them ?
> The Court: Sustained
> Did you produce them ?
> The Witness: No.

Again, there is no requirement that a broker-dealer drop what he is doing just to accommodate the S.E.C. The visit by Appoldt to Sloan's office was entirely unexpected as was the subsequent visit by Kanoff and Selvers later the same day. In this case, Kanoff and Selvers, particularly Selvers, acted with impropriety prior to the time Sloan failed to produce the capital computations. As Kanoff testified concerning his visit: (T-715 line 7).

> The Court: Tell us what you saw, tell us what you did.

The Witness: Well, Mr. Selvers and I entered the office. There was a young lady on the telephone. She was the only one we saw at the time. We waited until she was through with her phone conversation, identified ourselves and asked Mr. Sloan. The girl was somewhat agitated after we identified ourselves and said tha Mr. Sloan is not in the office at the moment but that he was coming back. He had just stepped down the hall or down to the lobby, I don't recall just what she did say- I think it was that he had just stepped down to the lobby, I believe there is a cafeteria down there.

We inquired of the young lady as to what her status was with the firm and what her name was, at which point she became further agitated, put on her hat and coat and left the physical office itself, went into hallway, at which point Mr. Selvers and I though perhaps that -- the purpose of our visit was to determine whether or not Mr. Sloan in fact had the computations that he was supposed to have brought to our office earlier in the day. We thought perhaps if this young lady were permitted to --

The Court: I don't think it is relevant, what they thought.....

Kanoff continued (T-716 line 15):

Mr. Selvers stepped out in the hall. I was left in the office of Sloan with this other gentleman that was there, Mr. Marashi.
Almost immediately Selvers and the young lady came back into the room. Shortly thereafter Mr. Sloan came back into his office, at which point the young lady left and we had our discussions, with Mr. Sloan, as far as producing these records.

Q. When you identified yourself, what did you do then ?
A. I carry an identification card furnished to me by the Commission in a wallet furnished to me by the Commission. I also carry on the outside of that wallet a badge from an organization I belong to, Association of Federal Investigators, and I think perhaps -- I think it was that badge that upset the young lady.
Q. Do you know if Mr. Selvers used any kind of physical force to cause the young lady to come back into the room ?
A. I wasn't in the hall, but I would doubt that very much.

Sloan also attempted to call Selvers to testify concerning this encounter, but Selvers had fallen on the ice and injured his back (T-709 lines 2-3).

It should be noted that these events occurred after almost

three years of continuous harassment of Sloan by the S.E.C. This harassment involved numerous visits to Sloan's office, many telephone calls, and continuous requests for the production of various documents. Unfortunately, only a small part of the entire picture is included in the record on appeal. However, the harassment to which Sloan objected most strenuously was not the harassment directed at Sloan himself but that directed to his friends, family, business associates, employees and other persons connected with Sloan. For example, in plaintiff's exhibit 36, a letter dated August 2, 1973, Sloan expressed outrage that a probing telephone call from the S.E.C. had caused an innocent friend of his to lose his job. Typically, the S.E.C.'s response to this letter was to call the individual's then former employer again to inquire further into the matter. After interrogating virtually every person associated with Sloan over a three year period, the S.E.C. had committed the outrage of holding the individual in question, Helga Thorvardardottir, in Sloan's office against her will, as the result of which she ran out of Sloan's office either in tears or on the verge of tears (T-328 lines 18-9) and never worked for Sloan again.

It is submitted that under these circumstances, and particularly considering the lateness of the hour (it was after 5:00 p.m.) it was entirely appropriate for Sloan to refuse to cooperate with the S.E.C. and to ask that Mr. Kanoff and Mr. Selvers leave his office (T-116 line 7). Nevertheless, Kanoff and Selvers did not leave until Sloan himself had left.

In short, there can be no finding of fault on Sloan's

part under the equitable doctrine of "unclean hands."

Finding #20. This statement of fact is untrue. The only testimony by Appoldt on this point was as follows: (T-407 line 25)

Q. Mr. Appoldt, subsequent to you August 16th visit, did you again visit the firm of Sloan & Co. ?
A. Yes, August 22nd.
Q. And what was the purpose of your August 22nd visit .
A. To look at the books and records.
Q. And did you examine the books and records ?
A. No, I did not.
Q. Why was that ?
A. Mr. Sloan was not present.
Q. Mr. Appoldt, since August have you had the opportunity to examine the books and records of Samuel H. Sloan & Company ?
A. No, I have not.
Mr. Sloan: Objection, your Honor. He is making a broad statement.
The Court: He has made a statement. You can take him on the cross-examination, I am going to overrule your objection and leave it to you to examine him on that subject.

It is submitted that the question was objectionable in that it asked for a conclusion. Thus, this testimony should not have been admitted.

The same kind of testimony was elicited from Kanoff (T-120-1) who testified that he tried to call Sloan in August, 1973 and failed to reach him. However, Kanoff did not specify the dates of the calls or even the telephone number which he had called.

Kanoff also testified (T-122) that on September 5, 1973 he had sent a letter to Sloan in care of General Delivery, Zurich, Switzerland, asking him to contact the New York Regional Office with reference to his registration as a broker dealer. Kanoff

testified that the reason he had done this was that Sloan had sent him a picture postcard which he believed was from Zurich (T-122 line 13). The S.E.C. attempted to offer the letter into evidence as plaintiff's exhibit 18 but an objection to its admissibility was sustained by the court (T-125 line 3).

It should be apparent that the S.E.C. was not really trying to examine Sloan's books and records. Rather, it was trying to build its case for a subsequent presentation in court. As Sloan himself testified (T-815):

> "There was a Mr. Marashi who was at the office at all times, and if the Commission had come to the office at any time during the end of August and the entire month of September they would have found Mr. Marashi there and had instructions to make these records available to the Commission should they choose to look at them."

The S.E.C. did not contradict this testimony. Instead, it was apparently their contention that since Sloan was in Europe during part of the relevant period, that his books were therefore somehow inaccessible (See T-122 line 19).

The true specious nature of the S.E.C.'s claim was established by the fact that Sloan brought his books and records with him to the courtroom and references were made to them several times during the trial./ (See T-638, line 16). For example on T-295 line 19, the following colloquy took place:

> The Court: You heard what I said. I don't care what you have computerized.
> Do you have any book or record reflecting the Canadian Javelin transactions which were originally entered in your records?
> The Witness: Yes.
> The Court: If so, I would ask you to produce it now. You may leave the stand to go to a large pile of books and records which I see at the side of the courtroom. There are approximately nine cartons of

records. You are now going to those records, taking one one of the cartons and you are going to produce something, I am sure.
The Witness: I just opened this book.
The Court: You have now produced a book or record ?
The Witness: Yes.
The Court: Very good. Let's mark it for identification

Clearly, Sloan's books and records were in the courtroom at the time of the trial. There is no evidence in the record or otherwise that the S.E.C. expressed even the slightest interest in examining the records. In fact, at one point of the trial, Judge Ward seemed to invite the S.E.C. to require Sloan to produce a certain record and the S.E.C. declined to do so and moved on to another topic.

Therefore, it is evident that the S.E.C. attorneys were once again engaging in professional misconduct in making a demonstrably false claim to the court. This is characteristic of the S.E.C.'s entire attitude towards this case. For example, Kanoff wrote a letter to Sloan c/o General Delivery, Zurich, Switzerland. At the same time Kanoff did not write a letter to Sloan's office, 11 Broadway, New York, N.Y., where he knew Sloan could have been reached. Thus, Kanoff was trying to reach Sloan where he knew Sloan wasn't. It is submitted that these tactics should be condemned by the Courts.

It should be observed that Judge Ward's findings in paragraph 20 were specifically relied upon in the decision by the S.E.C. to bar Sloan for life from being associated with any broker or dealer. In the matter of Samuel H. Sloan, supra.

Finding #21. As usual, the district court elaborated considerably

in making this finding of fact. Bruder testified regarding this date on T-483-4. There is no testimony that Bruder prepared this document (plaintiff's exhibit 43) on January 25, 1971. Furthermore, there is no testimony that Bruder used "other information" or even the pink sheets for pricing purposes. Thus, the only testimony from Bruder is that according to his calculation, Sloan had a net capital deficiency of $28,016 on January 18, 1971.

On his direct case, Sloan introduced into evidence his own capital computation for January 18, 1971, as defendant's exhibit 00, which showed that Sloan met the net capital rule on this date in that his net capital was $6,061.34 (T-729 line 23). This capital computation was based on a trial balance which was prepared by an accountant, Raymond Leon, and marked as plaintiff's exhibit 42.

Thus, Bruder's capital computation for January 18, 1971 showed a net capital deficiency of $28,016 whereas Sloan's capital computation based on a trial balance Sloan submitted to Bruder showed excess net capital of $1,064.34 for the same date.

To explain the vast difference between these two computations for the same date, Sloan testified as follows: (T-735 line 2):

> What Mr. Bruder did was he made his own trial balance and he included these figures in. These figures were not part of the general ledger accounts. They were in a total different part of the ledger book. They were not part of the actual -- even though they were in the same book, there were not trial balance items at all.

Since the testimony of Bruder was that his computations

were based on information which could not be derived from Sloan's books and records and since this information, according to Bruder's testimony, could not be verified by independent means, it is obvious that all of Bruder's testimony on this point had no probative value.

Finding #22. Bruder testified on this item beginning at T-484. Again the district court was sloppy in that Bruder never testified that he used the "pink sheets and public journals for pricing purposes." Bruder did however, use "other information." Specifically, he deducted a $10,000 "unconfirmed gift" from Sloan's mother.

The logic behind this deduction is a mystery. Apparently, Bruder wrote Sloan's mother, Dr. Marjorie Sloan, a letter, plaintiff's exhibit 45,asking if she had ever given her son $10,000. When Bruder did not receive a reply, he deducted $10,000 from Sloan's capital. It should be noted that nowhere on Sloan's books was an entry reflecting the receipt in the form of a gift or otherwise of $10,000 from Sloan's mother. Thus, Bruder's deduction was based on hearsay, or, more accurately, negative hearsay. Since Sloan's mother did not reply to the letter, Bruder felt justified in deducting $10,000 from Sloan's capital. It is hard to imagine what Mr. Bruder was thinking of when he made this deduction. Logically, if Sloan's mother had loaned him $10,000 and he had an obligation to return this money, it would be proper and logical to deduct this amount from capital. However, Bruder's contention apparently was that Sloan did not owe his mother $10,000.

Without speculating any further on the meanderings of Bruder's mind, it should be pointed out that certified public accountant filed a certified financial statement for Sloan & Co. as of the same date. This statement was coincidentally offered into evidence as part of plaintiff's exhibit 1. According to that statement, Sloan had a net capital of $9527.99 on January 29, 1971, the same date that Bruder found a capital deficiency of $11,912. Raymond Leon, the accountant who prepared that certified statement, testified as Sloan's witness at trial and verified the accuracy of this statement. Furthermore, Leon filed the certified financial statement with the S.E.C. and the statement was accepted by the S.E.C. No objection was made by the S.E.C. at that time. However, nearly two years later, at the time of the administrative proceeding, the S.E.C. first advanced the claim that Sloan was in violation of the net capital rule on January 29, 1971. Clearly, such a claim is barred by the doctrine of laches.

Finding #23. Several things should be said about this finding, the first being that the date is wrong. Kanoff testified that he first visited Sloan's office on March 19, 1971. (T-36 line 4). Furthermore, as noted previously, Kanoff did not mention the name of Joseph F. Iny in his direct testimony. Additionally, the amount actually deducted by Kanoff was $58,175 (T-141 line 25).

However, without bickering over details, the most important argument against this finding is that Kanoff was wrong. Kanoff based his deduction on the proposition that the $58,175 was a loan payable to Joseph Iny. At trial, the following points were established.

a) Sloan did not tell Kanoff that he owed $58, 175 to Iny.

b) Iny did not tell Kanoff that Sloan owed Iny $58, 175.

c) The books and records of Sloan & Co. did not show that Sloan owed Iny $58,175 or any other sum of money.

d) Sloan did not in fact owe Iny $58,175.

The question then is how did Kanoff reach the determination to treat the sum of $58,175 as a "loan payable" to Iny. Again, there is no point in speculating on the workings of Kanoff's mind. All that the court need observe is that Kanoff was wrong and that therefore finding #23 is wrong.

Finding #24. Although there is no dispute that Sloan had a net capital deficiency on June 30, 1971, it is the contention of Sloan that this net capital deficiency occurred because of the wrongfully obtained temporary restraining order and because of the fact the Chemical Bank bounced all of Sloan's checks from June 18, 1971 until June 28, 1971. Clearly, this circumstance would normally have an adverse effect on Sloan's net capital or the capital of any broker dealer caught in that situation. It should be noted that Robert W. Taylor was not exactly Sloan's own accountant since the S.E.C. had arranged the introduction of Sloan to Taylor on June 21, 1971 and had set Sloan's hiring of Taylor as a condition precedent to the S.E.C. agreeing to a preliminary injunction and waiving the request for a receiver. Also, it can be observed from finding #27 that the S.E.C. does not contend that Sloan was doing business on June 30, 1971. Presumably, if Sloan was not doing business, he could not be in violation of the net capital rule on that date.

Finding #25. As was shown by cross examination, the net capital computations for these dates are riddled with mistakes and are based on hearsay and incorrect conclusions. However, without dealing with each computation in detail, it should be sufficient to note that Kanoff admitted that all of these capital computations were wrong. (T-96 line 23).

Finding #26. In this finding, it is necessary to deal individually with the numerous errors and mistakes made in each of these computations. It is interesting to note that even after Kanoff admitted to having made mistakes, the S.E.C. persisted in claiming that Sloan's net capital was what Kanoff originally determined it to be. This state of affairs goes not only to the factual issue but also to the constitutional issues involved in this lawsuit. Clearly, if an S.E.C. staff investigator is incapable of making an accurate determination of net capital in accordance with S.E.C. rules, the rules themselves must be unconstitutional.

For example, relative to July 31, 1971 date, Kanoff testified that he found that Sloan had a net capital deficiency of $70,800 whereas Sloan's accountant, Robert W. Taylor, found a deficiency of $37,300 for the same date. Kanoff testified that the $33,500 difference was the result of the treatment of facts to receive as a liability. This explanation does not conform to the evidence as can be seen from an actual examination of exhibits 7 and 7A. Consequently, one can only speculate as to what Kanoff did differently from what Taylor did to bring about the large difference in the figures.

The "facts" contained in this paragraph presumably constitutes a major portion of the S.E.C's case even though they are outside the time period of the complaint. The major error in the finding of these "facts" lies in the entire method of approach to the problem. It is acknowledged that Sloan submitted figures to the S.E.C. for each of the dates in question. However, Kanoff did not rely on the figures submitted by Sloan. Instead, he generated figures of his his own. Then, at trial, the S.E.C. asserted that Kanoff's computations were correct. At no time did the S.E.C. assert that Sloan's figures were wrong even though the two sets of figures were different. The reason for this can presumably be found in the testimony of Kanoff when he said (T-136 line 12):

"Additionally, that particular computation done by the broker is meaningless as far as my job is concerned because in analyzing the trial balance we would make our own computation."

By proceeding in this manner, the S.E.C. was able to present its direct case in such a way as to keep the Court from focusing on the precise areas of disagreement between the two sets of figures. By accepting this method of proceeding, the Court permitted the burden of proof to shift from the plaintiff to the defendant. In the trial balances and capital computations in question, some of the major areas of difference arose from the pricing of security positions. Both Kanoff and Sloan testified that they examined the pink sheets for pricing purposes for the days in question and yet they reached substantially different conclusions. Apparently, the trier of the fact chose to believe Kanoff and not to believe Sloan. It is submitted that under the best evidence rule the court should not have been required to make such a determination because the S.E.C. could have offered the pink sheets and the Wall Street Journal into evidence for the purpose of establishing the correct security prices for the days in question. In addition, the prices could have been found in the National Stock Summary published by the National Quotation Bureau, Inc. Had Kanoff done this, he would not have made several errors. For example, in several of the trial balances in question, Sloan was long 200 shares of Voplex Corp. Kanoff could not find a price for Voplex Corp. in the pink sheets and therefore gave these shares zero value. (T-191). However, Kanoff apparently overlooked the fact that Voplex Corp. was traded on the American Stock Exchange (T-190). Sloan had given these shares the correct valuation of $14 per share. Thus, on this point alone, the capital computations of Kanoff were off by $2,800 . Similarly, during the administrative hearing, Kanoff admitted under oath that a malfunction by the S.E.C.'s photocopy machine had caused Sloan's position in American Raceways and

Brooklyn Poly Industries to be erased from the list of securities owned by Sloan. (R-232-233). Consequently, the value of these securities were left out of Kanoff's capital computation. At the administrative hearing, Kanoff admitted that he would have to make his calculations over again to correct for this omission.

The most interesting thing about all this is that these errors of Kanoff were called to the attention of both Kanoff and the S.E.C. at the time of the administrative hearing and , in spite of the fact that Kanoff admitted his error at the time of the administrative hearing, the S.E.C. came back into court with precisely the same erroneous capital computations at the trial more than a year later.

In other cases, Kanoff made liberal use of misinformation obtained by means of hearsay. With respect to the September 30, 1971 trial balance Kanoff deducted an alleged $13,000 loss at J.S. Love & co. According to the trial transcript, that deduction was stricken by the Court because it was based on hearsay (T-72 line 16). Thus, Sloan's capital for that date should have been $13,000 greater than Kanoff's computation indicated. Therefore, based on Kanoff's own testimony (T-74 line 8), Sloan should have had a $2,271 capital surplus on September 30, 1971 rather than a $10,729 capital deficiency on that date.

A little later in the trial, the S.E.C. produced an entire chart of hearsay in the form of plaintiff's exhibit 15 upon which figures contained in finding 26 are based. Sloan moved to strike this document on the ground and the court ruled as follows:

> THE COURT: This one I am going to admit the document subject to produce supporting evidence for these footnotes. If they do not produce supporting evidence during the course of this trial, you may make a motion to strike this exhibit. Do you understand what I am saying.
> MR. SLOAN: Yes, your Honor.

The government did not produce supporting evidence for these footnotes. At a later point in the trial, Sloan attempted to strike exhibit

15 on this ground. The Court indicated it would reserve decision on Sloan's application (T-488 line 21 and T-489 line 9).

Later, when the Court made its decision reported at 369 F. Supp. 996, it apparently accepted some of the hearsay items and rejected some of the other items. It does not seem, however, that the Court made an individualized determination of when was properly included in the footnotes to exhibit 15. Rather, it appears that the Court merely copied the figures contained in the S.E.C.'s proposed findings of fact. It is submitted that this was an error and that the entire finding # 26 and plaintiff's exhibit 15 on which it is based should be stricken by the Court.

Finding #27. This finding is an unusual hodgpodge of misinformation conveniently divided into 11 subparagraphs letter a through k. As will be shown, the S.E.C. did not prove this part of its case and the district court apparently did not examine the record to see what, if anything, the S.E.C. proved. As a result, the decision of this case contains another paragraph which is largely unsupported by the evidence. This paragraph is important because, if Sloan was not doing business, he would obviously not be subject to the net capital bookkeeping rule.[8]

This paragraph purports to show that "Sloan & Co. continued to effect transactions in securities in interstate commerce otherwise than on a national securities exchange." However, none of the eleven subparagraphs to this finding make any reference to the means of interstate commerce. Instead, these paragraphs refer to "telephone conversations," "confirmations lying about the office," "securities in view" and the "presence of runners."

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8. The word "obvious" is emphasized mainly because this point is not obvious at all.

None of these constitute a showing of interstate commerce.

Finding #27(a). At no time during the trial did Bruder give testimony in any way resembling the finding in this paragraph. Furthermore, it is obvious that Bruder could not overhear telephone conversations in which Sloan received quotations unless Bruder was listening in on the line. There is no testimony that Bruder was listening in on Sloan's telephone conversations.

Finding #27(b). Kanoff gave no such testimony.

Finding #27(c). This adds considerably to what Kanoff actually did say. Kanoff's entire testimony on this point was as follows: (T-50 line 13)

> Q. During this visit on April 8th did you determine or was there any evidence that Sloan & Company was doing business ?
> A. Well, from my observations in the office, he was doing business.
> Q. And what did you observe ?
> A. Confirmation slips, securities.

This is all that Kanoff said on this point. Thus, Kanoff gave no testimony that he overheard telephone conversations or observed runners entering or leaving the office.

Finding #27(d). Here again, Kanoff said something different (T-52 line 23):

> Q. During your May 6th visit to Sloan's office, did you find any evidence of Sloan & Company doing business ?
> A. Yes.
> Q. And what would that be ?
> A. The activity in the answer, confirmations, securities, telephone activity.

One wonders what Kanoff was referring to by "the answer." In any event, this testimony fails to establish that Sloan was doing business.

Finding #27(e). This time, half of the district court's finding is supported by the record. On T-65 line 24 , Kanoff testified:

> Q. At your August 10th visit, Mr. Kanoff, were you able to observe Sloan & Co. doing business .
> A. Yes.
> Q. And how did you determine that ?
> A. Confirmation with current dates on them.
> THE COURT: You examined them ?
> THE WITNESS: Yes, sir.

At no time did Kanoff say that he observed securities in view. Furthermore, it is submitted that this testimony does not prove anything. On cross, Kanoff testified that Sloan was not present at the time of this visit (T-183, line 9). It is hard to imagine how Sloan could be doing business if he was not in his office. (Sloan was actually working for another stock brokerage firm at this time).

Finding #27(f). Here Kanoff testified (T-167, line 11):

> Q. Mr. Kanoff, did you observe Sloan & Co. doing business on August 12th?
> A. I really don't recall, Mr. Selvers.

After being thusly rebuffed, Selvers tried again. (T-67, line 20):

> Q. Did you examine the long and short position of that date?

After consulting a memo (plaintiff's exhibit 8) and after a brief discussion, Kanoff replied (T-68, line 11):

> A. I have no recollection of doing that and this memo I have just looked at doesn't indicate that I did.

Finding #27(g). Neither Kanoff nor anyone else gave testimony in this regard and in no way does an examination of the July, 1971 and August, 1971 trial balances result in such a conclusion. The simple fact is that a trial balance is like a balance sheet. It represents the status of the broker at a given point in time. An examination of two trial balances cannot lead to an inference of what took place in between the dates of those trial balances. Furthermore, the S.E.C. had access to Sloan's basic blotters and ledgers for this period but did not bother to come to Sloan's office to examine them (T-638, line 16). Furthermore, on July 28, 1971 Sloan met at the offices of the S.E.C. and entered into an agreement permitting Sloan to receive and deliver securities, pay checks and effect liquidating transactions. The S.E.C. offered at trial to stipulate as to the terms of this agreement (T-197, line 14). Therefore, Sloan was acting in accordance with this agreement by engaging in the conduct described in the finding.

Finding #27(h). The testimony on this point can be found at T-108 and T-112. It is submitted that this testimony does not prove anything.

It must be remembered that during this period the S.E.C. had full and free access to Sloan's books and record. The S.E.C. maintained its office at 26 Federal Plaza which is less than a fifteen minute walk to Sloan's office at 120 Liberty Street. However, the S.E.C. did not go to Sloan's office in 1971 after August 12, 1971. The fact is that although the S.E.C. claims that Sloan entered into at least seven transactions which represented new business, at no time did the a S.E.C. state what these transactions were.

Finding #27(i). The only testimony on this point can be found on T-226. Nowhere in this testimony does Sloan state that his trial balance represented certain securities as being in the "possession" of Sloan & Co. Instead, Sloan testified that he listed the securities as assets of Sloan & Co. Therefore, what Sloan did was perfectly proper. Clearly, it would have been improper to fail to list these securities as assets. According to S.E.C.'s own proposed findings Sloan was the sole proprietor of Sloan & Co.

Once again, the S.E.C. succeeded in defrauding the court. A trial balance is merely a listing of assets and liabilities. A trial balance does not indicate the possession or location of securities. That is to be found in another record known as the stock record. In short, the finding of the district court is wrong.

Finding #27(j). Although for once this finding is supported by the record (T-211 line 24) there is no explanation of how this fact constituted a violation of federal securities laws or even shows that Sloan was doing business in December, 1971. Since Sloan first applied in December, 1971 one would presume that Sloan did not resume doing an active business until a later date.

Finding # 27(k). There is no evidence in the record on this point.

However, there is some inconclusive evidence that Sloan was "in" the pink sheets in January, 1972, (T-213 et seq.). Still, there is no evidence whatsoever that Sloan listed bid and asked quotations. On this point S.E.C. had issued a release (CCH ¶ 79,693) which makes it clear that there is a legal distinction between listing bid and asked prices in the pink sheets as opposed to a listing in the pink sheets "in name only."

Finding #28. The capital computation prepared by Appoldt for May 24, 1973 was erroneous in the following respects:

A. Appoldt deducted from Sloan's capital $11,000 representing fails to deliver in Triex International Corp. because this security had been suspended by the S.E.C. (T-464). Appoldt's decision to do this was in conformity with S.E.C. Interpretative Release # 10205 (Defendant's exhibit L). In sum, that release stated that no value would be ascribed to fails to deliver in suspended securities. However, that release was issued on June 8, 1973, or two weeks after the date on which Appoldt made his computation. Thus, the S.E.C. was in effect claiming that Sloan had violated the net capital rule retroactively. To apply the interpretative release retroactively was a violation of Article 1 Section 9 Clause 3 of the Constitution which states that "No...ex post fact law shall be passed."[9]

However, Appoldt's deduction of the $11,000 was wrong for another reason. S.E.C. interpretative release #10205 was an interpretation of S.E.C. Rule 15c3-1. This interpretation was simply wrong as nothing in S.E.C. Rule

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9. It is interesting to observe that not only can S.E.C. rules be taken to have the effect of law but S.E.C. interpretive releases can be taken to have the same effect. Thus, in order to keep abreast of the latest developments in "federal securities law," one must read the "Exchange Act Releases" which are issued by the S.E.C. on a daily basis.

15c3-1 can be so construed as to justify the deduction from net capital of a fail to deliver in a suspended security. If the S.E.C. wanted to make such a rule the proper procedure was through its rule making procedures rather than through an "Exchange Act" interpretive release. These "Exchange Act Releases" are supposed to interpret existing rules, not to make new rules.

Had Appoldt not deducted the $11,000 in fails to deliver in Triex Corp., Sloan would have met the net capital requirement on this date and would have had a net capital surplus.

B. Appoldt deducted from Sloan's net capital a promissory note in the amount of approximately $10,000 (T-460 line 10). That note was paid on June 8, 1973 (T-776). It is submitted that the deduction of this $10,000 was arbitrary and unjustifiable.[10] Without this deduction, Sloan would have met the net capital requirements.

C. Appoldt deducted the sum of $12,500 from Sloan's capital as a non current asset. As to the reason for doing so, Appoldt testified (T-444 line 12):

> "This money was tied up in a bank account because of litigation from what I understand, and how I got that information I don't recall."

During a discussion of this circumstance, the Court said (T-445 line 14):

> THE COURT: Yes, I know that, I am fully aware of what we discussed yesterday, but this witness made certain computations and I would like to know how he did it. It may be that he was working on second rate hearsay, but if the underlying information was correct I will accept what he did. If it was incorrect, then I could have a problem.

It is submitted that the district court was wrong. Hearsay testimony by an S.E.C. staff investigator is inadmissible under any circumstances.

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10. It is admittedly the policy of the S.E.C. to deduct items of this nature from net capital. In this case, the appellant is arguing the the S.E.C. policy is wrong.

Appoldt's deduction was based on hearsay as Appoldt had had no conversations with Sloan regarding this deduction. Therefore, the $12,500 should not have been deducted. Appoldt testified that had he not taken this deduction Sloan would have met the net capital requirements.

D. Appoldt deducted another $15,000 item for reasons which are not clear (see T-463, line 13).

From all of this one should get an idea of how much capital Sloan really had on May 24, 1973. Appoldt deducted $11,000 + $10,000 + $12,500 + $15,000 for a total of $48,500 from Sloan's capital. After these deductions Appoldt found Sloan's capital to be $4,383 less than the minimum. It is apparent from these figures that Sloan's net worth was in excess of $50,000 on this date. For all of these reasons, it is submitted that the finding of fact contained in paragraph 28 is erroneous.

Finding #29. As usual, this finding is contrary to the record. The pertinent testimony on this point can be found on T-401 and T-402. Obviously, the second sentence in finding #29 is untrue and the significance of the first sentence in that finding is so unclear as to be meaningless. As to the third sentence, it is submitted that Judge Ward's ruling is erroneous. Again, the burden of proof should be on the S.E.C. to show that its computations are correct.

It appears that, through oversight, Sloan forgot to cross examine Appoldt on the August 2, 1973 trial balance. However, two points can be observed from examination of the trial balance itself (Plaintiff's exhibit 37). First, Appoldt was basing his calculation on the new $15,000 minimum net capital rule. That rule went into effect on August 1, 1973. The trial balance in question was taken as of August 2, 1973. Thus, Rule 15c3-1 was a different rule than what it was when this action was first commenced. However, the language of the new Rule 15c3-1 clearly states that the $15,000 requirement only applied to broker dealers

who did a general securities business with the public. Sloan, however, did no business with public customers and traded exclusively with other broker dealers. Therefore, the $5,000 net capital rule applied to Sloan. Thus, assuming that the S.E.C.'s computations were otherwise correct, Sloan had a capital deficiency of $10,046 rather than $20,046 on the date in question.

In making his computation, Appoldt again deducted $11,000 for fails to deliver in Triex International Corp. This was wrong. It makes no sense to deduct the fails to deliver in question from Sloan's assets while simultaneously deducting the former market value of the shares failed to deliver from his liabilities. Sloan was a short seller of Triex International Corp. and his failure to deliver those shares could not possibly have had an adverse affect on his capital liquidity sufficient to justify an $11,000 deduction from net capital. There is nothing in Rule 15c3-1 which provides for a deduction of fails to deliver in suspended securities. If the S.E.C. wanted to require such a deduction, it should have changed its rules.

For those reasons, taking Appoldts own figures, Sloan had $954 in excess net capital on August 2, 1973. Furthermore, when Sloan testified he stated that Appoldt had incorrectly priced many of his securities (T-799). The difference in the conflicting valuations adds up to $10,421, or enough to put him back into capital compliance assuming Sloan's required capital was $5,000.

Finding #30. At this point it is hard to determine whether the district court was suffering from a severe case of stupidity or whether it was merely displaying slight regard for the rights of the defendant. Although Sloan stipulated that, for purposes of this lawsuit, he lost $40,000, nothing was said about when this loss took place (T-805, line 16). The August 2, 1973 trial balance represented the financial

status of Sloan's business as of August 2, 1973 and that date alone. The fact that Sloan may have lost money in Canadian Javelin Ltd. before or after August 2, 1973 had no bearing on Sloan's trial balance as of that date.

Finding #31 (a). Appoldt gave no such testimony.

Finding #31 (b). Although Kanoff did testify in this manner (T-116-7) nothing in this finding shows that"Sloan & Co. continued to effect transactions in interstate commerce and otherwise than on a national securities exchange."

POINT VIII

SLOAN IS ENTITLED TO A HEARING ON HIS CHARGES OF FRAUD AND MISCONDUCT ON THE PART OF THE S.E.C. STAFF.

From the beginning of this lawsuit, Sloan has demonstrated a strong motivation to be vindicated. (Tr. dated June 23, 1971, p. 6, line 24). In a post-trial Rule 60(b) 3 motion, Sloan offered ample evidence of fraud, misrepresentation and misconduct on the part of the S.E.C. staff. This motion demonstrated a prima facie case of perjury induced by the S.E.C. attorneys in charge of the case. The only response to this motion was a "memorandum" which denied the charges.

If these charges are true, the S.E.C. attorneys in question should go to jail. Sloan has been prosecuted and persecuted for the past four years because of wrongful conduct on the part of the S.E.C. staff. An S.E.C. attorney does not wear the badge of immunity from criminal prosecution. An essential prerequisite to good government is that wrongdoers within the government should not go unpunished. It should not be forgotten that at the Mitchell, Stans trial G. Bradford Cook, who was chairman of the S.E.C. while these instant action was being prosecuted, testified that he had lied seven times under oath while Chairman of the

S.E.C. It should also not be forgotten that the Mitchell, Stans trial concerned a $200,000 cash contribution to the Nixon campaign made by one Robert Vesco ostensibly for the purpose of staving off an S.E.C. investigation.

The Rule 60(b)3 motion should have been granted. This action should be remanded to the district court and reassigned to a new judge for a hearing concerning Sloan's charges of illegal conduct on the part of the S.E.C. United States v John Anthony Taylor, 487 F. 2d 1307 (2d Cir. 1973).

Sloan also moved under Rule 60(b)2. The motion papers on this motion demonstrate the incredible harm which Sloan has suffered because of the wrongful prosecution of this action. Sloan's request for a hearing was denied. This was error. United States v Rosner 516 F. 2d 269 (1975); cf. United States v Kahn 472 F. 2d 272, 287 (2d Cir. 1973). The S.E.C. should not be permitted to walk away from this lawsuit free to bring more malicious lawsuits against innocent individuals. Under the Constitution, the Unites States has no authority to institute a civil suit and to harass its citizens with civil litigation. Furthermore, the United States cannot prevail in a criminal prosecution unless direct injury to the United States has been shown. This court, in deciding this case, should forever put an end to the practice by the government of bringing civil suits of the type here brought by the S.E.C. The citizens of this nation should be free from harassment by the government.

POINT IX

THE DEFENDANTS-APPELLANTS ARE ENTITLED TO AN AWARD OF COSTS INCLUDING REASONABLE ATTORNEYS FEES.

In Aleyska Pipeline Service v Wilderness Soc. ___ U.S.___ 44 L. Ed. 2d 141, 154, the Supreme Court on May 12, 1975, affirmed the rule that reasonable attorneys fees may be assessed for a wilful violation of a

court order or for bad faith or oppressive litigation practices. There the court stated:

> "Also, a court may assess attorneys fees for the 'wilful disobediance of a court order... as part of the fine to be levied on the defendant. Toledo Scale Co. v Computing Scale Co. 261 U.S. 399, 426-428 (1923)." Fleischmann Distilling Corp. v Maier Brewing Co. 386 U.S. 714, 718 (1967); or when the losing party has 'acted in bad faith, vexatiously, wantonly or for opressive reasons....' F.D. Rich Co. Inc. v Industrial Lumber Co., Inc. 417 U.S. 116, 129, (1974) (citing Vaughn v Atkinson 369 U.S. 527 (1962)); cf. Universal Oil Products Co. v Root Refining Co. 328 U.S. 575, 580 (1946)."

In the case at the bar, the S.E.C. has acted in bad faith, vexatiously, wantonly, and for opressive reasons. Therefore, this court should award costs and reasonable attorneys fees to the defendant, pro se.

CONCLUSION

For all of the reasons set forth above, the judgment of the district court should be vacated

Respectfully submitted,

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August 25, 1975

Law

[¶ 25,011] [Procedure for Broker- Dealer Registration]

Sec. 15 (b)(1) A broker or dealer may be registered for the purposes of this section by filing with the Commission an application for registration, which shall contain such information in such detail as to such broker or dealer and any persons associated with such broker or dealer as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors. Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission or within such shorter period of time as the Commission may determine.

.001 Historical comment.—

Act of August 20, 1964, Sec. 6(b), 78 Stat. 570, designated the first paragraph of Sec. 15(b) as (1) and substituted "any persons associated with such broker or dealer" for "any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such broker or dealer".—CCH.

• *Regulations*

[¶ 25,012] Application for Registration of Broker or Dealer

Reg. § 240.15b1-1. An application for registration of a broker or dealer filed pursuant to Section 15(b) shall be filed on Form BD in accordance with the instructions contained therein. [Adopted in Release No. 34-721, June 6, 1936; amended by Release No. 34-775, July 16, 1936; Release No. 34-890, October 10, 1936; Release No. 34-1887, September 10, 1938; and Release No. 5000, March 1, 1954, 19 F. R. 1041; renumbered by Release No. 34-7700 (¶ 77,282), September 10, 1965, 30 F. R. 11851.]

[¶ 25,013] Statement of Financial Condition to Be Filed with Application for Registration as a Broker or Dealer

Reg. § 240.15b1-2. (a) Every broker or dealer who files an application for registration on Form BD shall file with such application, in duplicate original, a statement of financial condition as of a date within 30 days of the date on which such statement is filed and as of a later date reflecting any material change, if there has been a material change. Such statement of financial condition shall (1) be in such detail as will disclose the nature and amount of assets and liabilities and the net worth of such broker or dealer (securities of such broker or dealer or in which such broker or dealer has an interest shall be listed in a separate schedule and, if a ready market for the security exists, valued at the market price with an indication of the market on which such valuation is made), and (2) contain a computation of his aggregate indebtedness and net capital which shall comply with the requirements applicable to the business of such broker or dealer under Rule 15c3-1 under the Act, or under the capital rule of the national securities exchange of which such broker or dealer is or has in good faith filed an application to become a member if the members of such exchange are exempt from compliance with Rule 15c3-1 pursuant to subparagraph (b)(2) thereof. For purposes of this paragraph (a), if the broker or dealer is a sole proprietorship, the personal assets and liabilities of such broker or dealer shall be included in the computations of his net worth, aggregate indebtedness, and net capital pursuant to clauses (1) and (2) hereof in testing compliance with his net capital requirements under the applicable capital rule. [As amended in Release No. 34-9594 (¶ 78,778) effective June 15, 1972, 37 F. R. 9668.]

(b) The schedule of securities furnished as a part of such statement of financial condition shall be deemed confidential if bound separately from the balance of such statement, except that it shall be available for official use by any official or employee of the United States or any state, by national securities exchanges and national securities associations of which the person filing such statement is a member, and by any other person to whom the Commission authorizes disclosure of such information as being in the public interest. Nothing contained in this paragraph shall be deemed to be in derogation of the rules of any national securities association or national securities exchange which give to customers of a member, broker or dealer the right, upon request to such member, broker or dealer, to obtain information relative to his financial condition.

(c) Every broker or dealer who files an application for registration on Form BD shall file with such application, in duplicate original, a statement which shall include the following:

(1) a representation that the capital of such broker or dealer has been contributed, and that such amount of capital will continue to be devoted, to his business as a broker or dealer, and a description of the nature and source of such capital, and

(2) a representation that adequate arrangements have been made by such broker or dealer for the establishment and maintenance of adequate facilities and the financing required for the carrying on of his business as a broker or dealer, and an undertaking that such broker or dealer will continue to maintain facilities and financing adequate for his business; and a detailed statement thereof, including a discussion of the nature of such arrangements with respect to (A) personnel, (B) physical facilities, (C) the maintenance and preservation of books and records as required by applicable provisions of law and any applicable rules of any national securities exchange or national securities association of which such broker or dealer is a member, including information concening any arrangements made for the adequate performance of these functions and duties with a bookkeeping service company, or data processing service company, or otherwise, and (D) the methods and procedures to be employed by such broker or dealer for the purpose of supervising the activities of persons associated with him, and

(3) a statement describing the arrangements made for the obtaining of the funds required for the operation of his business for the first year of operations, and the uses to which such funds will be put, stating in appropriate detail the expenses expected to be incurred for such first year of operations; and setting forth the arrangements made, if any, for the obtaining of additional funds if such funds should become necessary.

(d) Attached to each of the statements required by this rule shall be an oath or affirmation that the information contained therein is true and correct to the best knowledge and belief of the person making such oath or affirmation. The oath or affirmation shall be made before a person duly authorized to administer such oath or affirmation. If the broker or dealer is a sole proprietorship, the oath or affirmation shall be made by the proprietor; if a partnership, by a general partner; if a corporation, by a duly authorized officer.

(e) (1) The provisions of this rule shall not apply to a broker or dealer succeeding to and continuing the business of another registered broker or dealer provided that such successor broker or dealer files with the application on Form BD a statement of financial condition as specified in paragraph (a) of this rule.

[¶ 25,013] Reg. § 240.15b1-2—Continued

(2) The Commission may, upon written request or upon its own motion, exempt from the provisions of this rule any broker or dealer, either unconditionally or on specified terms or conditions, as it deems necessary or appropriate in the public interest or for the protection of investors.

(f) The statement of financial condition required by this rule shall be deemed a part of such application for registration within the meaning of Section 15(b) of the Act.

[Adopted in Release No. 34-4902, September 1, 1953, 18 F. R. 4516; amended by Release No. 34-5000, March 1, 1954, 19 F. R. 1041; Release No. 34-5560, September 15, 1957, 22 F. R. 6493; and by Release No. 34-7685, effective September 1, 1965, 30 F. R. 11137; renumbered by Release No. 34-7700 (¶ 77,282), September 10, 1965, 30 F. R. 11851 and amended in Release No. 34-9594 (¶ 78,778), effective June 15, 1972, 37 F. R. 9668.]

[¶ 25,014] Registration of Successor to Registered Broker or Dealer

Reg. 240.15b1-3. (a) In the event that a broker or dealer succeeds to and continues the business of another registered broker or dealer, the registration of the predecessor shall be deemed to remain effective as the registration of the successor for a period of 60 days after such succession, provided that an application for registration on Form BD is filed by such successor within 30 days after such succession.

(b) A Form BD, filed by a broker or dealer partnership which is not registered when such form is filed and which succeeds to and continues the business of a predecessor partnership registered as a broker or dealer, shall be deemed to be an application for registration, even though designated as an amendment, if it is filed to reflect the changes in the partnership and to furnish required information concerning any new partners.

[Adopted in Release No. 34-888, Oct. 7, 1935; amended by Release No. 34-1887, Sept. 10, 1938; and Release No. 34-5000, Mar. 1, 1954, 19 F. R. 1041; renumbered by Release No. 34-7700 (¶ 77,282), September 10, 1965, 30 F. R. 11851.]

[¶ 25,015] Registration of Fiduciaries

Reg. § 240.15b1-4. The registration of a broker or dealer shall be deemed to be the registration of any executor, administrator, guardian, conservator, assignee for the benefit of creditors, receiver, trustee in insolvency or bankruptcy, or other fiduciary, appointed or qualified by order, judgment, or decree of a court of competent jurisdiction to continue the business of such registered broker or dealer; *Provided*, that such fiduciary files with the Commission, within 30 days after entering upon the performance of his duties, a statement setting forth as to such fiduciary substantially the information required by Form BD.

[Adopted in Release No. 34-888, October 7, 1936; amended by Release No. 34-1887, September 10, 1938; and Release No. 34-5000, March 1, 1954, 19 F. R. 1041; renumbered by Release No. 34-7700 (¶ 77,282), September 10, 1965, 30 F. R. 11851.]

[¶ 25,125] [Financial Responsibility of Brokers and Dealers—Use of Customer Deposits and Securities]

Law

Sec. 15. (c)(3). No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility and related practices of brokers and dealers including, but not limited to, the acceptance of custody and use of customers' securities, and the carrying and use of customers' deposits or credit balances. Such rules and regulations shall require the maintenance of reserves with respect to customers' deposits or credit balances, as determined by such rules and regulations.

.001 Historical comment.—

Act of December 30, 1970, Sec. 7(d), 84 Stat. —, amended Sec. 15(c)(3), which formerly read as follows:

"No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or to attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility of brokers and dealers."

Section 15(c)(3) was added by the Act of June 25, 1938, Sec. 2, 52 Stat. 1075.—CCH.

• *Regulations*

[¶ 25,126] Net Capital Requirements for Brokers and Dealers

➠ *Rule 15c3-1 is proposed to be revised. See below. CCH.*

Reg. § 240.15c3-1. (a) No broker or dealer shall permit his aggregate indebtedness to all other persons to exceed 2000 per centum of his net capital, and every broker or dealer shall have the net capital necessary to comply with the following conditions:

(1) If he becomes registered as a broker or dealer on and after August 13, 1971, his aggregate indebtedness to all other persons on and after August 30, 1972 and for 12 months after becoming registered shall not exceed 800 per centum of his net capital, and except as provided for in subparagraphs (a)(3) and (a)(4) hereof, he shall have and maintain net capital of not less than $25,000; and

(2) If he became registered as a broker or dealer before August 13, 1971, and he does not come within the provisions of subparagraph (a)(3) or (a)(4) hereof, he shall have and maintain net capital of not less than $15,000 commencing July 31, 1973, and $25,000 commencing July 31, 1974;

(3) Notwithstanding the provisions of subparagraphs (a)(1) and (a)(2) hereof, if he promptly transmits all funds and delivers all securities received in connection with his activities as a broker or dealer, and does not otherwise hold funds or securities for, or owe money or securities to, customers he shall have and maintain net capital of not less than $5,000 if he does not otherwise carry accounts of or for customers; and

(4) The minimum net capital to be maintained by a broker or dealer meeting all of the following conditions shall be $2,500:

[¶ 25,126] Reg. § 240.15c3-1—Continued

(A) His dealer transactions (as principal for his own account) are limited to the purchase, sale and redemption of redeemable shares of registered investment companies; except that a broker or dealer transacting business as a sole proprietor may also effect occasional transactions in other securities for his own account with or through another registered broker-dealer;

(B) His transactions as broker (agent) are limited to:

(i) the sale and redemption of redeemable securities of registered investment companies; (ii) the solicitation of share accounts for savings and loan associations insured by an instrumentality of the United States; and (iii) the sale of securities for the account of a customer to obtain funds for immediate reinvestment in redeemable securities of registered investment companies; and

(C) He promptly transmits all funds and delivers all securities received in connection with his activities as a broker or dealer, and does not otherwise hold funds or securities for, or owe money or securities to, customers.

[Paragraph (a) of § 240.15c3-1, as amended by Release No. 34-7611 (¶ 77,241), effective December 1, 1965, 30 F. R. 7278; Release No. 34-9633 (¶ 78,829), effective July 31, 1972, 37 F. R. 11970.]

(b) *Exemptions.*

(1) The provisions of this rule shall not apply to any broker who is also a licensed insurance agent under the laws of any State or the District of Columbia, whose securities business is limited to effecting transactions in variable annuity contracts as general agent for the issuer, who promptly transmits all funds and delivers all variable annuity contracts received in connection therewith, and who does not otherwise hold funds or securities for or owe money or securities to customers, if the issuer files with the Commission an undertaking satisfactory to it that the issuer will assume responsibility for all valid claims arising out of all activities of such agent in effecting transactions in such variable annuity contracts; *provided, however,* That a broker transacting business as a sole proprietor who meets all other conditions of this subparagraph (b)(1) may also effect occasional transactions in other securities for his own account with or through another registered broker-dealer. [As amended by Release No. 34-5244, December 1, 1955, 20 F. R. 8265; and Release No. 34-7611 (¶ 77,241), effective September 1, 1965, 30 F. R. 7278.]

➡ *A new subsection (j) of Rule 17a-5 affects Rule 15c3-1(b)(2). See ¶ 26,156. CCH.*

(2) The provisions of this rule shall not apply to any member in good standing and subject to the capital rules of the American Stock Exchange, the Boston Stock Exchange, the Midwest Stock Exchange, the New York Stock Exchange, the Pacific Coast Stock Exchange, PBW Stock Exchange, or the Chicago Board Options Exchange, Inc., whose rules, settled practices and applicable regulatory procedures are deemed by the Commission to impose requirements more comprehensive than the requirements of this rule; *provided, however,* That the exemption as to the members of any exchange may be suspended or withdrawn by the Commission at any time, by sending

ten (10) days written notice to such exchange, if it appears to the Commission to be necessary or appropriate in the public interest or for the protection of investors so to do. This exemption shall not be available to the members of any exchange whose capital rules do not provide that in the computation of net capital there shall be a deduction of not less than 10% of the contract price of each item in the securities failed to deliver account which is outstanding 4 to 49 calendar days; 20% of the contract price of each item in the securities failed to deliver account which is outstanding 50 to 59 calendar days; and 30% of the contract price of each item in the securities failed to deliver account which is outstanding 60 or more calendar days. This exemption shall not be available to the members of any exchange whose rules do not provide after September 29, 1972 for ratios and net capital at least equal to the minimum ratios and net capital required by subparagraphs (a)(1) and (a)(2) hereof. [As amended by Release No. 34-4500, Sept. 29, 1950, 15 F. R. 6751; Release No. 34-5191, June 24, 1955, 20 F. R. 4817; Release No. 34-5431, January 2, 1957, 22 F. R. 159; Release No. 34-6691, January 22, 1962, 26 F. R. 12765; Release No. 34-7611 (¶ 77,241), effective July 1, 1965, 30 F. R. 7278; Release No. 34-8508 (¶ 77,653), effective March 6, 1969, 34 F. R. 1588; Release No. 34-9633 (¶ 78,829), effective July 31, 1972, 37 F. R. 11970; Release No. 34-9988 (¶ 79,213), effective February 1, 1973, 38 F. R. —.]

(3) The Commission may, upon written application, exempt from the provisions of this rule, either unconditionally or on specified terms and conditions, any broker or dealer who satisfies the Commission that, because of the special nature of his business, his financial position, and the safeguards he has established for the protection of customers' funds and securities, it is not necessary in the public interest or for the protection of investors to subject the particular broker or dealer to the provisions of this rule. [As adopted in Release No. 34-7611 (¶ 77,241), effective July 1, 1965, 30 F. R. 7278.]

(c) *Definitions.*—For the purpose of this rule:

(1) The term "aggregate indebtedness" shall be deemed to mean the total money liabilities of a broker or dealer arising in connection with any transaction whatsoever, including, among other things: money borrowed; money payable against securities loaned and securities "failed to receive"; the market value of securities borrowed (except for delivery against customers' sales) to the extent to which no equivalent value is paid or credited; customers' free credit balances; credit balances in customers' accounts having short positions in securities; and equities in customers' commodities futures accounts; but excluding

(i)[1] Indebtedness adequately collateralized, as hereinafter defined, by securities or spot commodities owned by the broker or dealer;

(ii)[1] Indebtedness to other brokers or dealers adequately collateralized, as hereinafter defined, by securities or spot commodities owned by the broker or dealer;

(iii)[1] Amounts payable against securities loaned which securities are owned by the broker or dealer;

(iv)[1] Amounts payable against securities failed to receive which securities were purchased for the account of, and have not been sold by, the broker or dealer;

[1] As published by the Commission in Release No. 34-7611, these subparagraphs are designated as (A) thru (H), while in the Federal Register and in the Code of Federal Regulations they are designated as (1) thru (viii). CCH.

[¶ 25,126] Reg. § 240.15c3-1—Continued

(v)[1] Indebtedness adequately collateralized, as hereinafter defined, by exempted securities;

(vi)[1] Amounts segregated in accordance with the Commodity Exchange Act and the rules and regulations thereunder;

(vii)[1] Fixed liabilities adequately secured by real estate or any other asset which is not included in the computation of "net capital" under this rule;

(viii)[1] Liabilities on open contractual commitments; and

(ix)[1] Indebtedness subordinated to the claims of general creditors pursuant to a satisfactory subordination agreement, as hereinafter defined.

(x) Liability Reserves established and maintained for refunds of charges required by Section 27(d) and 27(f) of the Investment Company Act of 1940, but only to the extent of the amounts on deposit in a segregated trust account in accordance with Rule 27d-1 under the Investment Company Act of 1940. [As added in Release No. 34-9460 (¶ 78,491) effective March 6, 1972, 37 F. R. 1473.]

(2) The term "net capital" shall be deemed to mean the net worth of a broker or dealer (that is, the excess of total assets over total liabilities), adjusted by

(i)[1] Adding unrealized profits (or deducting unrealized losses) in the accounts of the broker or dealer and, if such broker or dealer is a partnership, adding equities (or deducting deficits) in accounts of partners, as hereinafter defined;

(ii)[1] Deducting fixed assets and assets which cannot be readily converted into cash (less any indebtedness secured thereby) including, among other things, real estate; furniture and fixtures; exchange memberships; prepaid rent, insurance and expenses; good will; organization expenses; all unsecured advances and loans; customers' unsecured notes and accounts; deficits in customers' accounts, except in bona fide cash accounts within the meaning of section 4(c) of Regulation T of the Board of Governors of the Federal Reserve System; and the funds on deposit in a "segregated trust account" in accordance with Rule 27d-1 under the Investment Company Act of 1940, but only to the extent that the amounts on deposit in such segregated trust account exceed the amount of liability reserves established and maintained for refunds of charges required by Sections 27(d) and 27(f) of the Investment Company Act of 1940. Provided, however, that the cash and market value of securities, as reduced by the appropriate percentages provided in subparagraph (C) below, which are deposited with a clearing fund maintained by a clearing corporation or similar department or association of a national securities exchange or registered national securities association using a continuous net settlement system for the clearance and settlement of securities transactions (hereinafter called "clearing agency") need not be deducted under the provisions of this subparagraph. [As amended in Release No. 34-9460 (¶ 78,491), effective March 6, 1972, 37 F. R. 1474; and Release No. 34-9587 (¶ 78,759), May 8, 1972, 37 F. R. 9390.]

(iii)[1] Deducting the percentages specified below of the market value of all securities, long and short (except exempted securities) in the capital, proprietary and other accounts of the broker or dealer, including securities loaned to the broker or dealer pursuant to a satisfactory subordination agreement, as

[1] See page 18,298 for footnote. OCH.

hereinafter defined, and if such broker or dealer is a partnership, in the accounts of partners, as hereinafter defined:

(*a*)[2] In the case of nonconvertible debt securities having a fixed interest rate and a fixed maturity date which are not in default, if the market value is not more than 5 per cent below the face value, the deduction shall be 5 per cent of such market value; if the market value is more than 5 per cent but not more than 30 per cent below the face value, the deduction shall be a percentage of market value, equal to the percentage by which the market value is below the face value; and if the market value is 30 per cent or more below the face value, such deduction shall be 30 per cent;

(*b*)[2] In case of cumulative, nonconvertible preferred stock ranking prior to all other classes of stock of the same issuer, which is not in arrears as to dividends, the deduction shall be 20 per cent;

(*c*)[2] In the case of a debt security not in default which has a fixed rate of interest and a fixed maturity date and which is convertible into an equity security, the deduction shall be as follows: If the market value is 90% or more of the face value, the deduction shall be 30% of the market value, but in no event shall such deduction reduce the value of such security below 80% of face value for the purposes of this section; if the market value is below the face value by more than 10% but not more than 30%, the deduction shall be a percentage of market value equal to the percentage by which the market value is below the face value; if the market value is 30% or more below the face value, the deduction shall be 30%. [As amended by Release No. 34-8337 (¶ 77,565), 33 F. R. 9338, effective August 1, 1968.]

(*d*)[2] On all other securities, the deduction shall be 30 per cent; *Provided, however,* That such deduction need not be made in the case of (1) a security which is convertible into or exchangeable for other securities within a period of 30 days, subject to no conditions other than the payment of money, and the other securities into which such security is convertible, or for which it is exchangeable, are short in the accounts of such broker or dealer or partner, or (2) a security which has been called for redemption and which is redeemable within 90 days.

[As amended by Release No. 34-8337 (¶ 77,565), 33 F. R. 9338, effective August 1, 1968.]

(iv)[1] Deducting 30 per cent of the market value of all "long" and all "short" future commodity contracts (other than those contracts representing spreads or straddles in the same commodity and those contracts offsetting or hedging any "spot" commodity positions) carried in the capital, proprietary or other accounts of the broker or dealer and, if such broker or dealer is a partnership, in the accounts of partners as hereinafter defined:

(v) Deducting, in the case of a broker or dealer who has open contractual commitments, the respective deductions as specified in subdivision (iii)[1] of this sub paragraph, from the value (which shall be the market value whenever there is a market) of each net long and each net short position contemplated by any existing contractual commitment in the capital, proprietary and other accounts of the broker or dealer and, if such broker or dealer is a partnership, in accounts of partners, as hereinafter defined: *Provided, however,* That this deduction shall not apply to exempted securities, and that the deduction with respect to any individual commitment shall be reduced by the unrealized profit, in any amount not greater than the deduction provided for in sub-

[1] See footnote on page 18,298. CCH.

[2] As published by the Commission in Release No. 34-7611, these designations are (i), (ii) and (iii), while in the Federal Register and in the Code of Federal Regulations they are (a), (b) and (c). CCH.

[¶ 25,126] Reg. § 240.15c3-1—Continued

division (iii) of this subparagraph (or increased by the unrealized loss), in such commitment; and that in no event shall an unrealized profit on any closed transactions operate to increase net capital. [As amended by Release No. 34-8337 (¶ 77,565), effective August 1, 1968, 33 F. R. 9338.]

(vi)[1] Deducting an amount equal to 1⅓% of the market values of the total long or total short futures contracts in each commodity, whichever is greater, carried for all customers.

(vii)[1] Excluding liabilities of the broker or dealer which are subordinated to the claims of general creditors pursuant to a satisfactory subordination agreement as herein defined; and

(viii)[1] Deducting, in the case of a broker or dealer who is a sole proprietor, the excess of (*a*)[2] liabilities which have not been incurred in the course of business as a broker or dealer over (*b*)[2] assets not used in the business.

(ix) Deducting 10% of the contract price of each item in the securities failed to deliver account which is outstanding 40 to 49 calendar days; deducting 20% of the contract price of each item in the securities failed to deliver account which is outstanding 50 to 59 calendar days; and deducting 30% of the contract price of each item in the securities failed to deliver account which is outstanding 60 or more calendar days. [As added by Release No. 34-8508 (¶ 77,653), effective March 6, 1969, 34 F. R. 1588.]

(3) The term "exempted securities" shall mean those securities specifically defined as exempted securities in Section 3(a) of the Securities Exchange Act of 1934;

(4) the term "accounts of partners", where the broker or dealer is a partnership, shall mean accounts of partners who have agreed in writing that the equity in such accounts maintained with such partnership shall be included as partnership property;

(5) the term "contractual commitments" shall include underwriting, when-issued, when-distributed and delayed delivery contracts, endorsements of puts and calls, commitments in foreign currencies, and spot (cash) commodities contracts, but shall not include uncleared regular way purchases and sales of securities and contracts in commodities futures; a series of contracts of purchase or sale of the same security conditioned, if at all, only upon issuance may be treated as an individual commitment;

(6) indebtedness shall be deemed to be "adequately collateralized" within the meaning of this rule, when the difference between the amount of the indebtedness and the market value of the collateral is sufficient to make the loan acceptable as a fully secured loan to banks regularly making comparable loans to brokers or dealers in the community;

(7) The term "satisfactory subordination agreement" shall mean a written agreement duly executed by the broker or dealer and the lender, which agreement is binding and enforceable in accordance with its terms upon the lender, his creditors, heirs, executors, administrators, and assigns, and which agreement satisfies all of the following conditions:

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[1] As published by the Commission in Release No. 34-7611, these subparagraphs are designated as (F) thru (G), while in the Federal Register and in the Code of Federal Regulations they are designated as (i) thru (viii). CCH.

(i)[1] It effectively subordinates any right of the lender to demand or receive payment or return of the cash or securities loaned to the claims of all present and future creditors of the broker or dealer;

(ii)[1] The cash or securities are loaned for a term of not less than one year;

(iii)[1] It provides that the agreement shall not be subject to cancellation by either party, and that the loan shall not be repaid and the agreement shall not be terminated, rescinded or modified by mutual consent or otherwise if the effect thereof would be to make the agreement inconsistent with the conditions of this rule or to reduce the net capital of the broker or dealer below the amount required by this rule;

(iv)[1] It provides that no default in the payment of interest or in the performance of any covenant or condition by the broker or dealer shall have the effect of accelerating the maturity of the indebtedness;

(v)[1] It provides that any notes or other written instruments evidencing the indebtedness shall bear on their face an appropriate legend stating that such notes or instruments are issued subject to the provisions of a subordination agreement which shall be adequately referred to and incorporated by reference;

(vi)[1] It provides that any securities or other property loaned to the broker or dealer pursuant to its provisions may be used and dealt with by the broker or dealer as part of his capital and shall be subject to the risks of the business;

(vii)[1] Two copies of such agreement, and of any notes or written instruments evidencing the indebtedness, are filed, within 10 days after such agreement is entered into, with the Regional Office of the Commission for the region in which the broker or dealer maintains his principal place of business, together with a statement of the full name and address of the lender, the business relationship of the lender to the broker or dealer, and whether the broker or dealer carried funds or securities for the lender at or about the time the agreement was entered into. If each copy of such agreement is bound separately and clearly marked "Non-Public" such agreements shall be maintained in a non-public file; *provided, however,* That they shall be available, for official use, to any official or employee of the United States or any State; to any national securities exchange and any registered national securities association of which the broker or dealer filing such agreements is a member; and to any other person to whom the Commission authorizes disclosure in the public interest.

(8) The term "customer" shall mean every person except the broker or dealer: *provided, however,* that partners who maintain "accounts of partners" as herein defined shall not be deemed to be customers insofar as such accounts are concerned.

(9) The term "clearing fund" shall mean a fund established by a clearing agency to receive and hold deposits of cash or securities or both cash and securities from members of such clearing agency for use in payment, and as security for payment, of the liabilities of such members to such clearing agency, or for use in payment by the clearing agency of liabilities it has incurred as a result of its clearing and settling of securities transactions. [As added in Release No. 34-9587 (¶78,759), May 8, 1972, 37 F. R. 9390.]

[1] See footnote on page 18,298. CCH.

[¶ 25,126] Reg. § 240.15c3-1—Continued

(10) The term "continuous net settlement system" shall mean that system for the clearing and settlement of securities transactions whereby a clearing agency: (A) compares trade execution data submitted by members to arrive at agreed upon contract terms; (B) on a given date nets purchases and sales of securities by a member with such member's previously unfulfilled purchase or sale obligations with respect to such securities; (C) allocates delivery obligations as to money and securities between members and the clearing agency itself for unsettled transactions; and (D) acts as the other party in the settlement of cleared transactions between members with respect to both money and securities. [As added in Release No. 34-9587 (¶ 78,759), May 8, 1972, 37 F. R. 9390.]

[Adopted in Release No. 34-3323, October 28, 1942; amended by Release No. 34-3602, November 9, 1944; Release No. 34-3617, November 9, 1944; Release No. 34-3663, February 21, 1945, 13 F. R. 8177; Release No. 34-4500, September 29, 1950, 15 F. R. 6751; Release No. 34-5156, May 20, 1955, 20 F. R. 2611; Release No. 34-5191, June 24, 1955, 20 F. R. 4817; Release No. 34-5244, December 1, 1955, 20 F. R. 8265; Release No. 34-5431, January 2, 1957, 22 F. R. 159; Release No. 34-6691, January 22, 1962, 26 F. R. 12765; Release No. 34-7611 (¶ 77,241), effective July 1, 1965, 30 F. R. 7278; Release No. 34-8337 (¶ 77,565), 33 F. R. 9338, effective August 1, 1968; Release No. 34-8508 (¶ 77,653), effective March 1, 1969, 34 F. R. 1588 and Release No. 34-9460 (¶ 78,491), effective March 6, 1972, 37 F. R. 1473; Release No. 34-9587 (¶ 78,759), May 8, 1972, 37 F. R. 9390; Release No. 34-9633 (¶ 78,829), effective July 31, 1972, 37 F. R. 11970.]

Proposed Rule

Reg. § 240.15c3-1.

(a) No member, broker or dealer shall permit his aggregate indebtedness to all other persons to exceed 1500 per centum of his net capital, and every broker or dealer shall have the net capital necessary to comply with the following conditions:

(1) In the case of a newly registered broker or dealer his aggregate indebtedness to all other persons for 12 months after becoming registered as a broker or dealer shall not exceed 800 per centum of his net capital, and except as otherwise provided for in this paragraph (a) he shall have and maintain net capital of not less than $25,000; and

(2) If a broker or dealer became registered before August 13, 1971, and if not otherwise provided for in paragraph (a), he shall have and maintain net capital of not less than $15,000 and not less than $25,000 commencing July 31, 1974;

(3) Notwithstanding the provisions of subparagraphs (a)(1) and (a)(2) hereof, a broker or dealer shall have and maintain net capital of not less than $5,000 if he meets any of the following conditions but engages in no other securities activities:

(A) He introduces and forwards as broker all transactions and accounts of customers and promptly forwards all of the funds and securities of customers received in connection with his activities as a broker on a fully disclosed basis, and does not otherwise hold funds or securities for, or owe money or securities to, customers and does not otherwise carry accounts of or for customers;

"as manager" pursuant to paragraph (d), all purchases, sales and transfers in the stabilized and offered securities, and if the offering is a rights offering, in the rights, during the period beginning on the 9th business day prior to the first day upon which the offering was made or on the business day prior to the day upon which the first stabilizing purchase was effected, whichever date is earlier, and ending on the day when stabilizing was terminated: *Provided, however,* (i) That transactions reported "as manager" shall not again be reported "not as manager" and (ii) that in the case of securities offered pursuant to an effective registration statement under the Securities Act of 1933 the distribution shall not be deemed to commence for purposes of this paragraph (e) prior to the effective date of the registration statement. [Amended in Release No. 34-9717 (¶ 78,939), effective September 25, 1972, 37 F. R. 17383.]

(f) *Public Records.* Reports filed pursuant to this rule will be available for public inspection after all of the required reports have been filed.

[Adopted in Release No. 34-1890, March 15, 1939; amended by Release No. 34-2967, September 10, 1941, 13 F. R. 8177; Release No. 34-3153, February 13, 1942, 13 F. R. 8177; Release No. 34-4417, March 15, 1950, 15 F. R. 1869; and Release No. 34-5300, July 1, 1956 21 F. R. 2787; Release No. 34-9717 (¶ 78,939), effective September 25, 1973, 37 F. R. 17383.]

[Compilation reference: ¶ 26,153.]

[¶ 26,980] Reg. § 240.17a-3 (Rule 17a-3) Records to Be Made by Certain Exchange Members, Brokers and Dealers

Reg. § 240.17a-3. (a) Every member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange, and every broker or dealer who transacts a business in securities through the medium of any such member, and every broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934, as amended, shall make and keep current the following books and records relating to his business:

(1) Blotters (or other records of original entry) containing an itemized daily record of all purchases and sales of securities, all receipts and deliveries of securities (including certificate numbers), all receipts and disbursements of cash and all other debits and credits. Such records shall show the account for which each such transaction was effected, the name and amount of securities, the unit and aggregate purchase or sale price (if any), the trade date, and the name or other designation of the person from whom purchased or received or to whom sold or delivered.

(2) Ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts.

(3) Ledger accounts (or other records) itemizing separately as to each cash and margin account of every customer and of such member, broker or dealer and partners thereof, all purchases, sales, receipts and deliveries of securities and commodities for such account and all other debits and credits to such account.

(4) Ledgers (or other records) reflecting the following:

(A) securities in transfer;

(B) dividends and interest received;

(C) securities borrowed and securities loaned;

(D) monies borrowed and monies loaned (together with a record of the collateral therefor and any substitutions in such collateral);

(E) securities failed to receive and failed to deliver.

(F) All long and all short stock record differences arising from the examination, count, verification and comparison pursuant to Rule 17a-13 and Rule 17a-5 hereunder (by date of examination, count, verification and comparison showing for each security the number of shares of long or short count differences). [Added by Release No. 34-9376 (¶ 78,374), effective January 1, 1972, 36 F. R. 21180.]

(5) A securities record or ledger reflecting separately for each security as of the clearance dates all "long" or "short" positions (including securities in safekeeping) carried by such member, broker or dealer for his account or for the account of his customers or partners and showing the location of all securities long and the offsetting position to all securities short, including long security count differences and short security count differences classified by the date of the physical count and verification in which they were discovered, and in all cases the name or designation of the account in which each position is carried. [As amended in Release No. 34-9376 (¶ 78,375), effective January 1, 1972, 36 F. R. 21180.]

(6) A memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities, whether executed or unexecuted. Such memorandum shall show the terms and conditions of the order or instructions and of any modification or cancellation thereof, the account for which entered, the time of entry, the price at which executed and, to the extent feasible, the time of execution or cancellation. Orders entered pursuant to the exercise of discretionary power by such member, broker or dealer, or any employee thereof, shall be so designated. The term "instruction" shall be deemed to include instructions between partners and employees of a member, broker or dealer. The term "time of entry" shall be deemed to mean the time when such member, broker or dealer transmits the order or instruction for execution or, if it is not so transmitted, the time when it is received.

(7) A memorandum of each purchase and sale for the account of such member, broker, or dealer showing the price and, to the extent feasible, the time of execution; and, in addition, where such purchase or sale is with a customer other than a broker or dealer, a memorandum of each order received, showing the time of receipt, the terms and conditions of the order, and the account in which it was entered. [As amended effective January 13, 1969, Release No. 34-8429 (¶ 77,616), 33 F. R. 16333.]

(8) Copies of confirmations of all purchases and sales of securities and copies of notices of all other debits and credits for securities, cash and other items for the account of customers and partners of such member, broker or dealer.

(9) A record in respect of each cash and margin account with such member, broker or dealer containing the name and address of the beneficial owner

of such account and, in the case of a margin account, the signature of such owner; provided that, in the case of a joint account or an account of a corporation, such records are required only in respect of the person or persons authorized to transact business for such account.

(10) A record of all puts, calls, spreads, straddles and other options in which such member, broker or dealer has any direct or indirect interest or which such member, broker or dealer has granted or guaranteed, containing, at least, an identification of the security and the number of units involved.

(11) A record of the proof of money balances of all ledger accounts in the form of trial balances, and a record of the computation of aggregate indebtedness and net capital, as of the trial balance date, pursuant to § 240.15c3-1; *Provided, however,* (i) That such computation need not be made by any member, broker or dealer unconditionally exempt from § 240.15c3-1 by subparagraph (b)(1) or (b)(3), thereof; and (ii) that any member of an exchange whose members are exempt from § 240.15c3-1 by subparagraph (b)(2) thereof shall make a record of the computation of aggregate indebtedness and net capital as of the trial balance date in accordance with the capital rules of at least one of the exchanges therein listed of which he is a member. Such trial balances and computations shall be prepared currently at least once a month.

(12)(A) A questionnaire or application for employment executed by each "associated person" (as hereinafter defined) of such member, broker or dealer, which questionnaire or application shall be approved in writing by an authorized representative of such member, broker or dealer and shall contain at least the following information with respect to such person:

(1) his name, address, social security number, and the starting date of his employment or other association with the member, broker or dealer;

(2) his date of birth;

(3) the educational institutions attended by him and whether or not he graduated therefrom;

(4) a complete, consecutive statement of all his business connections for at least the preceding ten years, including his reason for leaving each prior employment, and whether the employment was part-time or full-time;

(5) a record of any denial of membership or registration, and of any disciplinary action taken, or sanction imposed, upon him by any federal or state agency, or by any national securities exchange or national securities association, including any finding that he was a cause of any disciplinary action or had violated any law;

(6) a record of any denial, suspension, expulsion or revocation of membership or registration of any member, broker or dealer with which he was associated in any capacity when such action was taken;

(7) a record of any permanent or temporary injunction entered against him or any member, broker or dealer with which he was associated in any capacity at the time such injunction was entered;

(8) a record of any arrests, indictments or convictions for any felony or any misdemeanor, except minor traffic offenses, of which he has been the subject;

(9) a record of any other name or names by which he has been known or which he has used;

provided, however, that if such associated person has been registered as a registered representative of such member, broker or dealer with, or his employment has been approved by, the National Association of Securities Dealers, Inc., or the American Stock Exchange, the Boston Stock Exchange, the Midwest Stock

Exchange, the New York Stock Exchange, the Pacific Coast Stock Exchange, or the Philadelphia-Baltimore Stock Exchange, then retention of a full, correct, and complete copy of any and all applications for such registration or approval shall be deemed to satisfy the requirements of this subparagraph.

(B) For purposes of subparagraph (12 of paragraph (a) of this rule the term "associated person" shall mean a partner, officer, director, salesman, trader, manager, or any employee handling funds or securities or soliciting transactions or accounts for such member, broker or dealer.

(b)(1) This rule shall not be deemed to require a member of a national securities exchange, a broker or dealer who transacts a business in securities through the medium of any such member, or a broker or dealer registered pursuant to Section 15 of the Act, to make or keep such records of transactions cleared for such member, broker or dealer as are customarily made and kept by a clearing broker or dealer pursuant to the requirements of Rules 17a-3 and 17a-4, *Provided that* the clearing broker or dealer has and maintains net capital of not less than $25,000 and is otherwise in compliance with Rule 15c3-1 or the capital rules of the exchange of which such clearing broker or dealer is a member if the members of such exchange are exempt from Rule 15c3-1 by subparagraph (b)(2) thereof.

(2) This rule shall not be deemed to require a member of a national securities exchange, a broker or dealer who transacts a business in securities through the medium of any such member, or a broker or dealer registered pursuant to Section 15 of the Act, to make or keep such records of transactions cleared for such member, broker or dealer by a bank as are customarily made and kept by a clearing broker or dealer pursuant to the requirements of Rules 17a-3 and 17a-4, *Provided that* such member, broker or dealer obtains from such bank an agreement in writing to the effect that the records made and kept by such bank are the property of the member, broker or dealer, and *Provided further* that such bank files with the Commission a written undertaking in form acceptable to the Commission and signed by a duly authorized person, that such books and records are available for examination by representatives of the Commission as specified in Section 17(a) of the Act, and that it will furnish to the Commission, upon demand, at its principal office in Washington, D. C. or at any Regional Office of the Commission designated in such demand, true, correct, complete and current copies of any or all of such records. Such undertaking shall include the following provisions:

> The undersigned hereby undertakes to maintain and preserve on behalf of [*BD*] the books and records required to be maintained and preserved by [*BD*] pursuant to Rules 17a-3 and 17a-4 under the Securities Exchange Act of 1934 and to permit examination of such books and records at any time or from time to time during business hours by examiners or other representatives of the Securities and Exchange Commission, and to furnish to said Commission at its principal office in Washington, D. C., or at any Regional Office of said Commission specified in a demand made by or on behalf of said Commission for copies of books and records, true, correct, complete and current copies of any or all, or any part, of such books and records. This undertaking shall be binding upon the undersigned, and the successors and assigns of the undersigned.

Nothing herein contained shall be deemed to relieve such member, broker or dealer from the responsibility that such books and records be accurately maintained and preserved as specified in Rule 17a-3 and Rule 17a-4.

[As amended in Release No. 34-9734 (¶ 78,953), effective October 31, 1972, 37 F. R. 17027.]

(c) This rule shall not be deemed to require a member of a national securities exchange, or a broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934, as amended, to make or keep such records as are required by Paragraph (a) reflecting the sale of United States Tax Savings Notes, United States Defense Savings Stamps, or United States Defense Savings Bonds, Series E, F and G.

(d) The records specified in paragraph (a) of this rule shall not be required with respect to any cash transaction of $100.00 or less involving only subscription rights or warrants which by their terms expire within 90 days after the issuance thereof.

[Adopted in Release No. 34-2304, January 2, 1940, 13 F. R. 8177; amended by Release No. 34-3131, January 21, 1942, 13 F. R. 8177; Release No. 34-4845, May 12, 1953, 18 F. R. 2879; Release No. 34-5705, July 1, 1958, 23 F. R. 3807; Release No. 34-6646, November 10, 1961, 26 F. R. 9630; Release No. 34-8023 (¶ 77,425), effective March 1, 1957, 32 F. R. 864; Release No. 34-8429 (¶ 77,616), effective January 13, 1969, 33 F. R. 16333; Release No. 34-9376 (¶ 78,375), effective January 1, 1972, 36 F. R. 21180; and Release No. 34-9736 (¶ 78,953), effective October 31, 1972, 37 F. R. 17027.]

[Compilation reference: ¶ 26,154. For official statements on interpretation and application of this regulation, see ¶ 26,061; 72,120.]

[¶ 26,981] Reg. § 240.17a-4 (Rule 17a-4) Records to Be Preserved by Certain Exchange Members, Brokers and Dealers

Reg. § 240.17a-4. (a) Every member, broker and dealer subject to § 240.17a-3 shall preserve for a period of not less than six years, the first two years in an easily accessible place, all records required to be made pursuant to paragraphs 1, 2, 3 and 5 of § 240.17a-3.

➧ *For proposed amendment of Rule 17a-4(a), see ¶ 77,611. CCH.*

(b) Every such member, broker and dealer shall preserve for a period of not less than three years, the first two years in an easily accessible place:

(1) All records required to be made pursuant to paragraphs 4, 6, 7, 8, 9 and 10 of § 240.17a-3.

(2) All check books, bank statements, cancelled checks and cash reconciliations

(3) All bills receivable or payable (or copies thereof), paid or unpaid, relating to the business of such member, broker or dealer, as such.

(4) Originals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to his business as such.

(5) All trial balances, computations of aggregate indebtedness and net capital (and working papers in connection therewith), financial statements, branch office reconciliations, and internal audit working papers, relating to the business of such member, broker or dealer, as such.

(6) All guarantees of accounts and all powers of attorney and other evidence of the granting of any discretionary authority given in respect of any account, and copies of resolutions empowering an agent to act on behalf of a corporation.

(7) All written agreements (or copies thereof) entered into by such member, broker or dealer relating to his business as such, including agreements with respect to any account.

(c) Every such member, broker and dealer shall preserve for a period of not less than six years after the closing of any customer's account any account cards or records which relate to the terms and conditions with respect to the opening and maintenance of such account.

(d) Every such member, broker and dealer shall preserve during the life of the enterprise and of any successor enterprise all partnership articles or, in the case of a corporation, all articles of incorporation or charter, minute books and stock certificate books.

(e) Every such member, broker and dealer shall maintain and preserve in an easily accessible place all records required under subparagraph (12) of § 240.17a-3 until at least three years after the "associated person" has terminated his employment and any other connection with the member, broker or dealer.

(f) The records required to be maintained and preserved pursuant to Rules 17a-3 and 17a-4 may be immediately produced or reproduced on microfilm and be maintained and preserved for the required time in that form. If such microfilm substitution for hard copy is made by a member, broker, or dealer, he shall (1) at all times have available for Commission examination of his records, pursuant to Section 17(a) of the Act, facilities for immediate, easily readable projection of the microfilm and for producing easily readable facsimile enlargements, (2) arrange the records and index and file the films in such a manner as to permit the immediate location of any particular record, (3) be ready at all times to provide, and immediately provide, any facsimile enlargement which the Commission by its examiners or other representatives may request, and (4) store separately from the original one other copy of the microfilm for the time required. [As amended by Release No. 34-8875 (¶ 77,811), effective June 15, 1970, 35 F. R. 7643.]

(g) If a person who has been subject to § 240.17a-3 ceases to transact a business in securities directly with others than members of a national securities exchange, or ceases to transact a business in securities through the medium of a member of a national securities exchange, or ceases to be registered pursuant to Section 15 of the Securities Exchange Act of 1934, as amended, such person shall, for the remainder or the periods of time specified in this rule, continue to preserve the records which he theretofore preserved pursuant to this rule.

[Adopted in Release No. 34-2304, January 2, 1940, 13 F. R. 8177; amended in Release No. 34-2669, October 29, 1940; Release No. 34-6646, November 10, 1961, 26 F. R. 9630; Release No. 34-8023 (¶ 77,425), effective March 1, 1967, 32 F. R. 864; and Release No. 34-8875 (¶ 77,811), effective June 15, 1970, 35 F. R. 7643.]

[Compilation reference: ¶ 26,155.]

[¶ 26,982] Reg. § 240.17a-5 (Rule 17a-5) Reports to Be Made by Certain Exchange Members, Brokers and Dealers

Reg. § 240.17a-5. (a) *Filing reports.* (1) This rule shall apply to every member of a national securities exchange who transacts a business in securities directly with or for others than members of a national securities exchange, every broker or dealer (other than a member) who transacts a business in securities through the medium of any member of a national securities exchange, and every broker or dealer registered pursuant to section 15 of the Act.

➠ *Rule 17a-5(a)(2)(iv) is proposed to be added. For text see ¶ 26,156.*

CCH.

(2) Every member, broker or dealer subject to this rule shall file reports of financial condition containing the information required by Form X-17A-5 [¶ 33,921], as follows: (i) a report shall be filed as of a date within each calendar year, except that (*a*) the first such report of a member, broker or dealer (other than one succeeding to and continuing the business of another member, broker or dealer) shall be as of a date not less than one nor more

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 280 Richmond Avenue, Staten Island, N.Y. 10302. That on the 4 day of Sept, 1975 deponent served the within Brief upon S.E.C.-

attonrye(s) for appellee

in this action, at 26 Federal Plaza

N X C

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
4 day of Sept, 1975.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976